

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

APRIL TERM, 1938

335

No. 7228

SPECIAL CALENDAR

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H.
PAYNE, ET AL., AS COMMISSIONERS OF THE FED-
ERAL COMMUNICATIONS COMMISSION, APPELLANTS

VS.

PAUL R. HEITMEYER

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

FILED AUGUST 15, 1938

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

APRIL TERM, 1938

No. 7228

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H.
PAYNE, EUGENE O. SYKES, THAD H. BROWN, PAUL A.
WALKER, AND NORMAN CASE AS COMMISSIONERS OF
THE FEDERAL COMMUNICATIONS COMMISSION, AP-
PELLANTS

vs.

PAUL R. HEITMEYER, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

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I

A District Court of the United States for the District of
Columbia

In Equity No. 67291

PAUL R. HEITMEYER, PLAINTIFF

vs.

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H. PAYNE, EUGENE
O. SYKES, THAD H. BROWN, PAUL A. WALKER, AND NORMAN CASE
AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the District Court of the United States
for the District of Columbia, at the City of Washington, in said
District, at the times hereinafter mentioned, the following papers
were filed and proceedings had, in the above-entitled cause, to wit:—

1 In the District Court of the United States for the District
of Columbia

Filed May 31, 1938

In Equity No. 67291

PAUL R. HEITMEYER, OGDEN, UTAH, PLAINTIFF

vs.

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H. PAYNE, EUGENE
O. SYKES, THAD H. BROWN, PAUL A. WALKER, AND NORMAN CASE
AS COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D. C., DEFENDANTS

Bill of complaint

*To the Honorable, the District Court of the United States for the
District of Columbia:*

Comes now the plaintiff, Paul R. Heitmeyer, by his attorneys,
Clarence C. Dill and James W. Gum, and respectfully represents to
this Court as follows:

1. That during all the times herein mentioned, the plaintiff, Paul
R. Heitmeyer, has been and now is a citizen of the United States
residing at Ogden, Utah.

2. That the above-named defendants, Frank R. McNinch, T. A. M.
Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul
A. Walker, and Norman Case and each of them are citizens of the
United States and residents of the District of Columbia, and are
duly appointed, qualified, and acting members of the Federal Com-
munications Commission with its offices in the District of Columbia,
and that they are sued herein in their official capacities as said
Commissioners.

3. That the plaintiff brings this Bill of Complaint in his own right for the purpose of having this Court enjoin pendente lite and permanently the enforcement of a certain unlawful, arbitrary, and void order issued by the defendants in a certain cause entitled, "In the Matter of Paul R. Heitmeyer, Cheyenne, Wyoming," as a result of the reversal of the Commission's decision in the case entitled, "Paul R. Heitmeyer, Appellant v. Federal Communications Commission, Appellee, No. 6762, United States Court of Appeals for the

2 District of Columbia, which order if allowed to be enforced will work grave and irreparable injury to this plaintiff, compel him to incur great expense for a new hearing against new parties heretofore entire strangers to the above-named cause and made parties to said cause without authority of law and in defiance of the judgment of the United States Court of Appeals for the District of Columbia in said case, said order being set forth in the following paragraph and marked Exhibit "A."

4. That the said Order was duly made and entered by said defendants and each of them in a certain cause, matter, or application which has been and is now pending before said defendants as said Commissioners of said Federal Communications Commission, said cause being entitled "In the Matter of Paul R. Heitmeyer, Cheyenne, Wyoming," and being docketed and numbered as Federal Communications Commission Docket No. 3161, File No. B5-P-490. That said Order, which is marked Exhibit "A," is in words and figures and follows, to wit:

"Exhibit "A"

26884

Federal Communications Commission, Washington, D. C.

Docket No. 3161

"In the Matter of Paul R. Heitmeyer, Cheyenne, Wyoming

For Construction Permit

Order

"At a meeting of the Federal Communications Commission, held at its offices in Washington, D. C. on the 20th day of April 1938.

"The Commission, having on March 2, 1938, vacated its order of May 1, 1936, denying the application of Paul R. Heitmeyer, and the related Statement of Facts and Grounds for Decision, pursuant to and in conformity with the certified copy of Opinion and Judgment of the United States Court of Appeals for the District of Columbia in No. 6762, Paul R. Heitmeyer v. Federal Communications Commission.

"It is ordered, that the Record in this case be reopened for further hearing, such further hearing to be held before an Examiner and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company (File No. B5-P-1339), and a hearing this day ordered upon the applica-

3 tion of Cheyenne Radio Corporation (File No. B5-P-1499).

A copy of the notice of hearing containing a Bill of Particulars in each of these cases is attached hereto and hereby made a part of this order.

By the Commission.

T. J. SLOWIE,
Secretary."

5. That the said defendants, and each of them, by said order did override and disregard the right of plaintiff, and did nullify his right to a decision on the record made in the aforesaid case by consolidating consideration of his application, already heard, decided by the Commission, appealed to the United States Court of Appeals of the District of Columbia, reversed and remanded back to the Commission, with the consideration of the applications of two other parties, whose applications were not filed for consideration for many months after plaintiff's case had been appealed, said other applicants never having been parties to said cause not made parties by consent of the United States Court of Appeals.

6. That the said defendants, and each of them, on April 29, 1938, issued three notices, attached to and made a part of the above order consolidating the three applications, setting said applications for hearing on July 6, 1938 and directing plaintiff to file his Notice of Appearance and Statement of Facts not later than May 14th, 1938, under penalty of being declared in default under Rule 104.6 c of the Commission without right of further consideration by the Commission, said date for filing said Appearance being later extended to June 1, 1938, said Notices being attached hereto, and made a part hereof, and Marked Exhibit "B."

7. That the records of the above entitled case show that the plaintiff, Paul R. Heitmeyer first filed his application for a new radio station at Cheyenne, Wyoming, with the Federal Communications Commission on March 25th, 1935; that the Commission designated the application to be heard before an Examiner, October 30, 4 1935; that the Commission issued Notice of Hearing to all interested parties which included the plaintiff, Donald Lewis Hathaway of Casper, Wyoming, The Wyoming Radio Educational Association of Cheyenne, Wyoming and R. R. West of Rock Springs, Wyoming; that the application of plaintiff was consolidated for hearing with the said Wyoming Radio Educational Association for construction permit; and that said Cheyenne Radio Corporation and said Frontier Broadcasting Company, not being applicants for construction permits at the time of said hearing nor at any time previous to the decision and appeal of this case, were not given notice thereof nor did they appear thereat, nor did they ever appear in connection with this cause until the defendants consolidated the hearing and consideration of their applications with plaintiff's application by the Order and Notice aforesaid and marked Exhibit "A" and "B" respectively.

8. That at said hearing plaintiff appeared and adduced testimony in person and by witnesses, and introduced into evidence the depositions of certain persons and introduced evidence of certain exhibits in full and complete proof of the issues set forth in the Notice of Hearing as follows, to wit: (1) to determine the legal, technical,

financial and other qualifications of said applicant to construct and operate the proposed station; (2) to determine the need for the additional service in the area proposed to be served; (3) to determine whether the said application might be granted within the purview of Section 307 of the Communications Act of 1934, and the Regulations of the Commission as to quota, particularly Rule 6 (f); (4) because of the pendency of other applications from the same state or zone; (5) because of the pendency of other applications with which conflict might be had by reason of interference, particularly Palmer Broadcasting Syndicate, Inc.; (6) to determine whether

the site at which the applicant proposed to construct and operate the station would be satisfactory; (7) To determine whether the granting of the application would serve public interest, convenience and necessity; and that at the end of said hearing the Examiner notified all parties that the record was officially closed.

That on December 21, 1935, the said Examiner submitted his Report, No. I-173, to the Commission, recommending upon the evidence adduced upon said issues that the said application of plaintiff be granted, and that the said application of said Wyoming Radio Educational Association be denied. That said Report of said Examiner is attached hereto, made a part hereof, and marked Exhibit "C." That by his "Conclusions," in said Report, the said Examiner found as follows:

"The applicant is legally, technically, financially, and otherwise qualified to construct and operate the proposed station. A need for additional service such as proposed by the applicant does exist in the area proposed to be served, and this application may be granted within the purview of Section 307 of the Communications Act of 1934 and the Regulations of the Commission with regard to quota, particularly Rule 6 (f)."

"The Record is silent as to any possible interference with other applications that may be pending from the same state or zone."

"The site at which the applicant proposes to construct and operate the station will conform to the Rules and Regulations of the Commission."

"The granting of this application would serve public interest, convenience and necessity."

9. That on January 22, 1936, said Wyoming Radio Educational Association filed with the Commission its exceptions to the said Examiner's Report, and requested oral argument on its said application. That oral argument was had with counsel for plaintiff and for said Wyoming Radio Educational Association appearing before the Broadcast Division of said Commission, said argument covering both the application of plaintiff and of said Wyoming Radio Educational Association, and occurring on April 23, 1936.

10. That thereafter on May 1, 1936, the Commission made and entered its final order denying both the said application of plaintiff and the said application of the Wyoming Radio Education Association, that the said Order of denial is attached hereto, made a part hereof, and marked Exhibit "D."

11. That on June 29, 1936, plaintiff filed in the United States Court of Appeals for the District of Columbia, his appeal from the

said Order, said appeal bearing Number 6762 and being entitled, Paul Heitmeyer, Appellant, vs. Federal Communications Commission. That plaintiff hereby refers to the Transcript of Record filed in said appeal on June 29, 1936, and incorporates the same herein; and prays that it be read as a part hereof, as a verbatim account of the material parts of the entire proceedings before said defendants and each of them in the matter of plaintiff's said application.

12. That on December 27, 1937, said United States Court of Appeals for the District of Columbia, handed down its decision reversing the Commission. That said decision made, among others, the following statements:

"Under the circumstances, can it be said that the action of the Commission was anything but arbitrary, if not capricious? We think not; especially as its own findings were insufficient to support its conclusions of law and the decision based thereon . . . The decision, therefore will be reversed and the case remanded to the Commission with instructions to proceed with the application in conformity with this opinion. This does not mean that it is directed to issue a permit to the appellant. It is not the function of this court "To revise the action of the Commission from an administrative standpoint and to make an administrative judgment . . . the Commission in its further action is to respect and follow the determination of the questions of law by this court."

That plaintiff hereby refers to the said decision of said United States Court of Appeals for the District of Columbia, and hereby incorporates the same herein as though set out verbatim.

13. That said decision of the United States Court of Appeals was never appealed from by defendants or any of them, and that
7 the same has become a final judgment and decree in said cause under Sec. 402-(e) of the Communications Act of 1934.

14. That on March 3, 1938, the defendants and each of them vacated the prior order of the Commission by issuance of the following order:

"Pursuant to and in conformity with the Mandate of the United States Court of Appeals for the District of Columbia, received February 23, 1938, in No. 6762, Paul R. Heitmeyer, Appellant v. Federal Communications Commission, the Commission vacated its Order of May 1, 1936 (Minute No. 353), denying the application of Paul R. Heitmeyer for a construction permit to erect a new broadcast station at Cheyenne, Wyoming, to operate on 1210 kc, 100 watts, 250 watts-LS, unlt'd. time, and the related Statement of Facts and Grounds for Decision, issued June 12, 1936, and directed that the proceedings upon said application of Paul R. Heitmeyer be reopened for further consideration in accordance with the opinion and Mandate of said Court."

That on April 6, 1938, the plaintiff filed a petition with the Commission reviewing the proceedings to date and praying for a corrected decision on the record as made in this cause, which petition used the following language:

"He hereby respectfully petitions the Commission to make a final decision on the record as it now stands by preparing corrected findings of fact and conclusions of law and a new decision in accordance with the Judgment of the Court of Appeals as set forth in its decision reversing the action of the Commission in this case, as pro-

vided in Section 403-E in the Communications Act of 1934 as amended."

That on April 20th, 1938, the defendants and each of them, denied the said petition and issued the following release:

"Denied petition for Decision on Record requesting the Commission to 'make final decision on the record as it now stands by preparing corrected findings of fact and conclusions of law and a new decision'."

In the same release and as of the same date the defendants and each of them, made the following announcement:

"The Commission having on March 2, 1938, vacated its Order of May 1, 1936, denying the application of Paul R. Heitmeyer for CP to use 1210 kc, 100 watts, 250 W-LS, Unltd. time, and the related statement of facts and grounds for decision, pursuant to and in conformity with the Mandate of the United States Court of Appeals for the District of Columbia, in No. 6762, Paul R. Heitmeyer v. Federal Communications Commission, the Commis-

8 sion, upon its own motion, directed that the record in this case be reopened for further hearing and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company, and a hearing this day ordered upon the application of the Cheyenne Radio Corporation, such further hearing to be held before an Examiner."

That on April 20, 1938, the defendants and each of them, issued their order, hereinbefore recited in paragraph 4 or Exhibit "A" ordering plaintiff's application set down for further hearing and consolidated for hearing and consideration with the applications of the Frontier Broadcasting Company and the Cheyenne Radio Corporation, and on April 29, 1938, issued their Notice of Hearing, as recited in Paragraph 6 and attached hereto as Exhibit "B."

That on April 27, 1938, plaintiff filed a Motion in the United States Court of Appeals for the District of Columbia asking for a Rule upon the Federal Communications Commission to Show Cause why it had not complied with the judgment of that Court which Motion, on May 12, 1938, the Court denied, without written opinion.

That on May 18, 1938, plaintiff filed a motion with said Court of Appeals for a Stay of Mandate and Stay of Proceedings by the Federal Communications Commission while plaintiff would prepare and file a petition for Writ of Certiorari by the Supreme Court which motion on May 23, 1938, the Court of Appeals denied without written opinion.

15. That this Plaintiff, having exhausted all of his remedies at law and having made demand on the defendants for a decision on the record, and having been denied this demand, and being under order of the Commission to enter upon a new and second hearing with new parties to this cause, presents this Bill of Complaint in Equity to this Court for relief and protection of his rights from being destroyed by said defendants and each of them, who in total disregard of the said direction of said United States Court of Ap-

9 peals "to proceed with the application in conformity with this opinion," and in total disregard of the further direction of said Court "that the Commission is to respect and follow the determination of law by this Court," have made, entered and served upon plaintiff their said Order marked Exhibit "A" herein

and their said Notices marked Exhibit "B" herein, and further shows that unless restrained and enjoined by Order of this Court the said defendants will by said Order and said Notices set forth as Exhibits "A" and "B" herein, completely avoid and abort the said judgment and decree of said United States Court of Appeals by the following means, to wit:

(a) That said defendants will compel plaintiff to contest a second time for the approval of his said application, said contest to be based upon the relative merits of the qualifications of plaintiff and two new parties, namely, said Frontier Broadcasting Company and said Cheyenne Radio Corporation who are applicants for the identical and similar radio facilities requested by plaintiff, by their respective applications filed long subsequent to the time when plaintiff's said appeal had been taken to said United States Court of Appeals.

(b) That defendants will compel plaintiff to contest a second time for the approval of his said application, said contest being made with the aforesaid new parties who never became, and were never eligible to become parties to the record on plaintiff's said application before defendants, nor to the record on plaintiff's said appeal to said United States Court of Appeals.

(c) That defendants will compel plaintiff to contest a second time for the approval of his said application, the hearing therefor involving other issues than those upon which defendants and/or the said United States Court of Appeals have already found in favor of plaintiff by a judgment and decree of said Court which has become a final judgment in the cause.

(d) That by said Order and said Notices set forth herein as Exhibits "A" and "B," said defendants will compel plaintiff to adduce new and further testimony on new issues and old issues covering the period of time from May 1, 1936, the date of defendant's said final Order, to July 6, 1938, the date of the said proposed and noticed hearing.

(e) That by their said Order and said Notices set forth herein as Exhibits "A" and "B," defendants will compel plaintiff to contest a new case with new parties who will produce entirely new testimony upon the issues of their said respective applications, which testimony was never submitted to nor considered by said United States Court of Appeals in making its findings upon which it made its Judgment and Decree reversing said final Order of defendants as aforesaid.

(f) That by a process of repeatedly bringing in new parties when their final orders shall have been held arbitrary and void by the Court of Appeals on plaintiff's appeals therefrom in the future, and by the process of demanding from plaintiff additional and further proof on old and new issues for the periods elapsing during said appeals resulting from their further void and arbitrary orders not sustained by substantial evidence, the defendants can and will indefinitely postpone performance of the direction to them from said United States Court of Appeals "to proceed with the application in conformity" with the opinion of said Court; and said defendants can and will indefinitely defer the grant of a license for a radio station to furnish to the people of Wyoming and its capital the radio service for which said United States Court of Appeals has found there is an existing need and that plaintiff is a qualified ap-

plicant under the law requiring "a fair, efficient and equitable distribution of radio service" to each of "several States and communities" (Sec. 307 (b) Communications Act of 1934, as amended).

11 (g) That by said Order and said Notices set forth herein as Exhibits "A" and "B," said defendants will render null and void the evidence by which plaintiff sustained the general burden of proof imposed upon him as to all the issues set forth in Paragraph 8 hereof, upon which evidence the Commission based favorable findings except as to the financial qualifications of plaintiff and upon which evidence said United States Court of Appeals reversed said defendants by a judgment and decree that has become final in the said cause.

(h) That by said Order and said Notices marked Exhibits "A" and "B" herein, said defendants will destroy the record which has been and is binding upon defendants and plaintiff in the matter of plaintiff's said application, upon which record said defendants based their void and arbitrary decision and order, and upon which record said United States Court of Appeals based its findings and said judgment and decree of reversal.

(i) That by said Order and said Notices marked Exhibits "A" and "B" herein the defendants will create a new record for a new decision thereon, thereby violating the direction contained in said judgment and decree of said United States Court of Appeals that "the Commission in its further action is to respect and follow the determinations of the questions of law by this Court"; and said new record will deny to plaintiff a decision based upon the conditions as they were when the original record was made.

(j) That by said Order and said Notices marked Exhibits "A" and "B" herein, defendants will unjustly, unlawfully, and arbitrarily deny the said application of plaintiff on the record he made and upon which he has at all times been entitled to have a correct decision.

(k) That by said Order and said Notices marked Exhibits "A" and "B" herein, defendants will compel plaintiff to file appearances and statements of facts in response to said Notices under 12 penalty of defaults against plaintiff under the Rules and Regulations of said Commission whereby no further consideration will be given to the application of plaintiff if he fails to obey said Order and Notice.

16. That Plaintiff is informed and believes and therefore states the fact to be, that unless restrained and enjoined the defendants, their assistants and employees, will cause said Order and said Notices marked Exhibits "A" and "B" herein to be enforced and carried into effect, and that such enforcement will cause plaintiff great and irreparable loss and injury, whereas temporary restraint thereupon will in no way adversely affect defendants, and that plaintiff is without remedy therefor save in and by this Honorable Court, there being no plain, adequate or complete remedy at law.

17. That plaintiff alleges further that said Order set forth herein as Exhibit "A" and said Notices set forth herein as Exhibit "B" cannot, in law, operate to deprive plaintiff of his right to have a decision by said defendants in the matter of his said application in accordance with the directions contained in the said judgment and

decree of said United States Court of Appeals for the District of Columbia; and that the said Order and said Notices were and are illegal, arbitrary, and void, that they are a negation of justice and that they deny to plaintiff due process of law and equal protection of the laws of the United States and that they take the property of plaintiff without just compensation in contravention of Articles I and IV of the Constitution and the amendments to the Constitution of the United States.

18. That as stated by Examiner R. W. Seward in his report on the hearing of the application of the Frontier Broadcasting Company held while plaintiff's appeal was pending in the Court of Appeals as aforesaid, the City of Cheyenne will not support more than one broadcasting station, said statement being as follows:

13 "In view of the fact that the City of Cheyenne could not, when considering the evidence adduced at the Heitmeyer hearing as well as the instant hearing, support two broadcast stations, and the fact that the Heitmeyer application is now on appeal, it is considered that this Commission is not in a position to grant any application for the construction of a radio broadcast station in the City of Cheyenne, Wyoming, until the Heitmeyer case has been finally determined by the Court." (See Examiner Report 1-391, Released April 19, 1937.)

That therefore it is necessary that this Court enjoin the defendants, and each of them, from granting any construction permit or license for a new radio station at Cheyenne, Wyoming, pending a decision on the record in this case.

19. That plaintiff further represents that he is entitled to the issuance of a Writ of Injunction enjoining and restraining the said defendants and each of them, both permanently and pendente lite, from carrying into effect and execution the said void, illegal, and arbitrary Order and Notices herein set forth as Exhibits "A" and "B", thereby depriving plaintiff of his lawful rights as aforesaid.

WHEREFORE, inasmuch as the Plaintiff is without remedy at law and has no remedy save only in a Court of Equity, the plaintiff respectfully prays that process may issue out of this Court directed unto the above named defendants, Frank R. McNinch, T. A. M. Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul A. Walker, and Norman S. Case, Commissioners of the Federal Communications Commission, and that they and each of them, be enjoined and restrained from carrying into execution and effect, or causing to be executed or carried into effect against plaintiff their said Order marked Exhibit "A" herein, or their Notices marked Exhibit "B" herein, both pendente lite and permanently, and that defendants, and each of them, be enjoined from granting any construction permit or license to any other applicant for a radio station at Cheyenne, Wyoming until after they have rendered a decision on the record as made at the said hearings of the application of plaintiff.

14 That the said Order marked Exhibit "A" herein, and the said Notices marked Exhibit "B" herein, be declared null and void and of no effect.

That the defendants and each of them be ordered and directed to execute and carry into effect the judgment and decree of the Court

of appeals of the District of Columbia in that certain action entitled Paul R. Heitmeyer, Plaintiff, versus Federal Communications Commission, Number 6762, April Term 1936, by making corrected finding of fact and grounds for decision and a final decision thereon in accordance with and upon the record in said case as made and presented in said Court of Appeals of the District of Columbia.

That the plaintiff be granted a temporary restraining order without notice to said defendants or any of them, temporarily, restraining said defendants and each of them from executing or carrying into effect or causing to be executed or carried into effect their said Order marked herein as Exhibit "A," and their Notices marked herein as Exhibit "B."

That a rule to show cause why a preliminary injunction should not be granted to plaintiff be issued against the said defendants and each of them.

That a Writ of Subpoena issue to said Frank R. McNinch, T. A. M. Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul A. Walker, and Norman S. Case, Commissioners of Federal Communications Commission, requiring them and each of them to appear and answer this Bill of Complaint.

15 And for such other and further relief as the case may require, and as to this Court shall seem just and meet in the premises.

Respectfully submitted.

PAUL R. HEITMEYER,
By CLARENCE C. DILL,
JAMES W. GUM,
His attorneys.

DISTRICT OF COLUMBIA, ss.:

Clarence C. Dill being first duly sworn upon oath deposes and says that he is attorney for the above named plaintiff, that he has read the foregoing Bill of Complaint; that the facts stated therein are true and correct to the best of his knowledge, information and belief; that the above named plaintiff, Paul R. Heitmeyer, is absent from the District of Columbia.

CLARENCE C. DILL.

Subscribed and sworn to before me, a Notary Public, this 31 day of May, 1938.

[SEAL]

R. McQUESTEN,
Notary Public.

My Commission expires Jan. 24, 1940.

16 Federal Communications Commission, Washington, D. C.

NOTICE

File No. B5-P-490. 67291. Docket No. 3161

In re application of Paul R. Heitmeyer. (New.)

Dated March 25, 1935.

For Construction permit for new station.

Class of service, Broadcast.

Class of station, Broadcast.

Location, Cheyenne, Wyoming.

Operating assignment specified, Frequency 1210 kc; Power 100 w night; 250 w day; Hours of Operation, Unlimited.

To-----

You are hereby notified that the Commission has reexamined the above-described application and the record in this case, and has designated the matter for further hearing for the following reasons:

1. To determine whether the legal, technical, financial, and other qualifications of the applicant have changed in any respect since the original hearing upon this application and, if so, in what respect.

2. To determine whether the application may be granted within the purview of Section 307 (b) of the Communications Act of 1934, as amended by the Act of June 5, 1936 (49 Stat. 1475).

3. To determine the need for service in the area proposed to be served.

4. To determine whether the site at which the applicant proposes to construct and operate the station will be satisfactory.

5. To determine whether the equipment which the applicant proposes to use will comply in all respects with the Rules and Regulations of the Commission and will render proper service.

6. Because of the pendency of other applications from the same City, particularly those of the Frontier Broadcasting Company (Docket No. 4318, File No. B5-P-1339), and the Cheyenne Radio Corporation (Docket No. 5156, File No. B5-P-1499).

7. Because of the pendency of one application for the same facilities at Cheyenne, i. e., from the Cheyenne Radio Corporation (Docket No. 5156, File No. B5-P-1499).

8. To determine whether the interests of any other station or applicant may be adversely affected by reason of interference.

9. To determine whether the granting of the application would serve public interest, convenience, and necessity.

17 Attention is invited to Paragraph 104.6, subparagraphs b, c, and e, of the Rules and Regulations of the Federal Communications Commission, which are as follows:

104.6. b. In order to avail himself of the opportunity to be heard, the applicant shall, within 15 days of the mailing of the notice by the secretary, file with the Commission a written appearance and statement of his desire to be heard, in accordance with Rule 105.25.

Within 25 days of the mailing of the notice of hearing as aforesaid, any respondent who desires to participate in the hearing, shall file with the Commission his answer to any such appearance in accordance with Rule 105.26.

c. In case no appearance or statement in writing of the facts to be proved upon such hearing is filed by the applicant within the time so specified, the hearing will be cancelled, the applicant deemed in default, his application denied, and the secretary shall so notify the applicant and other parties to the hearing.

e. If at the date set for hearing, the applicant does not appear and offer evidence in support of his said application, a default will be entered, and the Commission will deny the application.

Attention is also called to the following: Rules and Regulations of the Federal Communications Commission, Paragraphs 105.25, 105.26, 105.34, 105.35, 106.22, 106.24, 106.26, 103.2, 103.3, 103.5, 103.8,

106.5, 106.8, 106.9, 106.10, 106.11, 106.12, 106.13, 106.15, 100.12, and such other said rules as may be applicable.

A copy of Practice and Procedure of the Federal Communications Commission may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., for a charge of ten cents a copy.

18 The attention of the applicant is directed to the fact that while his application constitutes a part of the record, it is not a part of the testimony and he should be prepared, at the hearing, to introduce testimony to prove the allegations contained in his application.

The specific grounds mentioned are not to be considered as exclusive of other grounds for the action and eventual decision of the Commission.

The hearing on the above mentioned application will be held on July 6, 1938 at the hour of 10:00 A. M., at the offices of the Commission, Washington, D. C.

Notices of the hearing on this matter are, on the date below stated being mailed to the following parties:

Paul R. Heitmeyer, Ben Lomond Hotel, Ogden, Utah. New. Applicant.

Frontier Broadcasting Company (a corporation), 1824 South Williams Street, Denver, Colorado. New. Applicant for permit for station to operate on 1420 kc freq. (Cheyenne, Wyoming).

Cheyenne Radio Corporation, 110 East 17th Street, Cheyenne, Wyoming. New. Applicant for permit for station to operate on 1210 kc freq. (Cheyenne, Wyoming).

If for any reason the applicant does not desire a hearing, he should notify the Secretary immediately so that notices sent to other parties may be cancelled.

Dated at Washington, D. C., April 29, 1938.

FEDERAL COMMUNICATIONS COMMISSION.
T. J. SLOWIE, *Secretary*.

TP:mes
(26906)

19 Federal Communications Commission, Washington, D. C.

NOTICE

File No. B5-P-1499. Docket No. 5156

In re application of Cheyenne Radio Corp. (New.)

Dated December 7, 1936.

For Construction permit.

Class of service, Broadcast.

Class of station, Broadcast.

Location, Cheyenne, Wyoming.

Operating assignment specified. Frequency 1210 kc; Power 100 w night; 250 w day; Hours of Operation Unlimited.

To-----

You are hereby notified that the Commission has examined the above-described application and has designated the matter for hearing for the following reasons:

1. To determine the legal, technical, financial and other qualifications of the applicant.

2. To determine the need for service in the area proposed to be served.

3. To determine whether the application may be granted within the purview of Section 307 (b) of the Communications Act of 1934, as amended by the Act of June 5, 1936 (49 Stat. 1475).

4. To determine whether the site at which the applicant proposes to construct and operate the station will be satisfactory.

5. To determine whether the equipment which the applicant proposes to use will comply in all respects with the Rules and Regulations of the Commission and will render proper service.

6. Because of the pendency of other applications from the same City, particularly those of Paul R. Heitmeyer (Docket No. 3161, File No. B5-P-490), and Frontier Broadcasting Company (Docket No. 4318, File No. B5-P-1339).

7. Because of the pendency of one application for the same facilities at Cheyenne, i. e., the application of Paul R. Heitmeyer (Docket No. 3161, File No. B5-P-490).

8. To determine whether the interests of any other station or applicant may be adversely affected by reason of interference.

9. To determine whether the granting of the application would serve public interest, convenience and necessity.

20 Attention is invited to Paragraph 104.6, subparagraphs b, c, and e, of the Rules and Regulations of the Federal Communications Commission, which are as follows:

104.6. b. In order to avail himself of the opportunity to be heard, the applicant shall, within 15 days of the mailing of the notice by the secretary, file with the Commission a written appearance and statement of his desire to be heard, in accordance with Rule 105.25.

Within 25 days of the mailing of the notice of hearing as aforesaid, any respondent who desires to participate in the hearing shall file with the Commission his answer to any such appearance in accordance with Rule 105.26.

c. In case no appearance or statement in writing of the facts to be proved upon such hearing is filed by the applicant within the time so specified, the hearing will be cancelled, the applicant deemed in default, his application denied, and the secretary shall so notify the applicant and other parties to the hearing.

e. If at the date set for hearing, the applicant does not appear and offer evidence in support of his said application, a default will be entered, and the Commission will deny the application.

Attention is also called to the following: Rules and Regulations of the Federal Communications Commission, Paragraphs 105.25, 105.26, 105.34, 105.35, 106.22, 106.24, 106.26, 103.2, 103.3, 103.5, 103.8, 106.5, 106.8, 106.9, 106.10, 106.11, 106.12, 106.13, 106.15, 100.12, and such other said rules as may be applicable.

A copy of Practice and Procedure of the Federal Communications Commission may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., for a charge of ten cents a copy.

21 The attention of the applicant is directed to the fact that while his application constitutes a part of the record, it is not a part of the testimony and he should be prepared, at the hearing,

to introduce testimony to prove the allegations contained in his application.

The specific grounds mentioned are not to be considered as exclusive of other grounds for the action and eventual decision of the Commission.

The hearing on the above mentioned application will be held on July 6, 1938, at the hour of 10:00 A. M., at the offices of the Commission, Washington, D. C.

Notices of the hearing on this matter are, on the date below stated being mailed to the following parties:

Cheyenne Radio Corporation, 110 East 17th Street, Cheyenne, Wyoming. New. Applicant.

Paul R. Heitmeyer, Ben Lomond Hotel, Ogden, Utah. New. Applicant for permit for station to operate on 1210 kc freq. (Cheyenne, Wyoming).

Frontier Broadcasting Company (a corporation), 1824 South Williams Street, Denver, Colorado. New. Applicant for permit for station to operate on 1420 kc freq. (Cheyenne, Wyoming).

If for any reason the applicant does not desire a hearing, he should notify the Secretary immediately so that notices sent to other parties may be cancelled.

Dated at Washington, D. C., April 29, 1938.

FEDERAL COMMUNICATIONS COMMISSION.
T. J. SLOWIE, *Secretary*.

TP: mes
(26907)

22 Federal Communications Commission, Washington, D. C.

NOTICE

File No. B5-P-1339. Docket No. 4318. 67291

In re application of Frontier Broadcasting Co. (a corporation) (New).

Dated August 28, 1936.

For Construction permit.

Class of service, Broadcast.

Class of station, Broadcast.

Location, Cheyenne, Wyoming.

Operating assignment specified, Frequency 1420 kc; Power 100 w night; 250 w day; Hours of Operation, Unlimited.

To -----

You are hereby notified that the Commission has reexamined the above-described application and has designated the matter for a hearing de novo for the following reasons:

1. To determine the legal, technical, financial and other qualifications of the applicant.

2. To determine the need for service in the area proposed to be served.

3. To determine whether the application may be granted within the purview of Section 307 (b) of the Communications Act of 1934, as amended by the Act of June 5, 1936 (49 Stat. 1475).

4. To determine whether the site at which the applicant proposes to construct and operate the station will be satisfactory.

5. To determine whether the equipment which the applicant proposes to use will comply in all respects with the Rules and Regulations of the Commission and will render proper service.

6. Because of the pendency of other applications from the same City, particularly those of Paul R. Heitmeyer (Docket No. 3161, File No. B5-P-490), and Cheyenne Radio Corporation (Docket No. 5156, File No. B5-P-1499).

7. To determine whether the interests of any other station or applicant may be adversely affected by reason of interference.

8. To determine whether the granting of the application would serve public interest, convenience and necessity.

23 Attention is invited to Paragraph 104.6, subparagraphs b, c, and e, of the Rules and Regulations of the Federal Communications Commission, which are as follows:

104.6. b. In order to avail himself of the opportunity to be heard, the applicant shall, within 15 days of the mailing of the notice by the secretary, file with the Commission a written appearance and statement of his desire to be heard, in accordance with Rule 105.25.

Within 25 days of the mailing of the notice of hearing as aforesaid, any respondent who desires to participate in the hearing, shall file with the Commission his answer to any such appearance in accordance with Rule 105.26.

c. In case no appearance or statement in writing of the facts to be proved upon such hearing is filed by the applicant within the time so specified, the hearing will be cancelled, the applicant deemed in default, his application denied, and the secretary shall so notify the applicant and other parties to the hearing.

e. If at the date set for hearing, the applicant does not appear and offer evidence in support of his said application, a default will be entered, and the Commission will deny the application.

Attention is also called to the following: Rules and Regulations of the Federal Communications Commission, Paragraphs 105.25, 105.26, 105.34, 105.35, 106.22, 106.24, 106.26, 103.2, 103.3, 103.5, 103.8, 106.5, 106.8, 106.9, 106.10, 106.11, 106.12, 106.13, 106.15, 100.12, and such other said rules as may be applicable.

A copy of Practice and Procedure of the Federal Communications Commission may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., for a charge of ten cents a copy.

24 The attention of the applicant is directed to the fact that while his application constitutes a part of the record, it is not a part of the testimony and he should be prepared, at the hearing, to introduce testimony to prove the allegations contained in his application.

The specific grounds mentioned are not to be considered as exclusive of other grounds for the action and eventual decision of the Commission.

The hearing on the above-mentioned application will be held on July 6, 1938, at the hour of 10:00 A. M., at the offices of the Commission, Washington, D. C.

Notices of the hearing on this matter are, on the date below stated, being mailed to the following parties.

Frontier Broadcasting Company (a corporation), 1824 South Williams Street, Denver, Colorado. New. Applicant.

Paul R. Heitmeyer, Ben Lomond Hotel, Ogden, Utah. New. Applicant for permit for station to operate on 1210 kc freq. (Cheyenne, Wyoming).

Cheyenne Radio Corp., 110 East 17th Street, Cheyenne, Wyoming. New. Applicant for permit for station to operate on 1210 kc freq. (Cheyenne, Wyoming).

If for any reason the applicant does not desire a hearing, he should notify the Secretary immediately so that notices sent to other parties may be cancelled.

Dated at Washington, D. C., April 29, 1938.

FEDERAL COMMUNICATIONS COMMISSION.
T. J. SLOWIE, *Secretary*.

TP:mes
(26908)

25

15368

Federal Communications Commission, Washington, D. C.

EXAMINER'S REPORT No. I-173

Docket No. 3161

IN RE APPLICATION OF PAUL R. HEITMEYER, CHEYENNE, WYOMING.
FOR CONSTRUCTION PERMIT

REQUESTED ASSIGNMENT

Frequency, 1210 kc; power, 100 watts, 250 watts-LS; hours of operation, unlimited.

WYOMING RADIO EDUCATIONAL ASSOCIATION, CHEYENNE, WYOMING.
FOR CONSTRUCTION PERMIT

Docket No. 2922

REQUESTED ASSIGNMENT

Frequency, 630 kc; power, 500 watts, 1 kw-LS; hours of operation, unlimited.

REPORT OF P. W. SEWARD, EXAMINER

The above entitled matters were consolidated for hearing and heard October 29 and 30, 1935.

Appearances: Clarence C. Dill and J. W. Gum on behalf of applicant, Paul R. Heitmeyer. Orman W. Ewing and George S. Smith on behalf of applicant, Wyoming Radio Educational Association. Horace L. Lohnes and E. D. Johnston on behalf of Station KTFI. Tyler Berry on behalf of the Commission.

This report is not final but is subject to approval, modification, or rejection by the Commission. The parties to the proceedings have

fifteen days, with the exception of those from the Fifth Zone who have twenty days, in which to file objections or exceptions, if any, to the report.

PRELIMINARY STATEMENT

In re: Paul R. Heitmeyer, Docket No. 3161

This is an application of Paul R. Heitmeyer of Ogden, Utah, for a construction permit to erect and place in operation a new radio station at Cheyenne, Wyoming, on a frequency of 1210 kilocycles with power of 100 watts night, 250 watts to local sunset, unlimited time. This application was designated for hearing to determine the issues set out in the Bill of Particulars.

STATEMENT OF FACTS

Paul R. Heitmeyer, the applicant herein, is a native born American citizen. He has been actively engaged in radio broadcasting for approximately fifteen years and has been connected with the operation of many radio stations in various capacities—technical operator, announcer, program manager, and manager. He is at this time the manager of radio station KLO at Ogden, Utah. If this application is granted, the applicant will retain his connection with radio station KLO in a supervisory capacity.

The applicant has on deposit the sum of \$20,000.00, which he borrowed from A. L. Glassman, of Ogden, Utah. Mr. Glassman is the principal stockholder in the Interstate Broadcasting Corporation, the owner and licensee of radio station KLO at Ogden. He is also publisher of the Oregon Standard Examiner and is interested in other lines of business. The \$20,000.00 was borrowed by the applicant without giving any collateral of any kind, and with the understanding that he has five years within which to repay the full amount, together with 6% interest thereon from date until paid, with a provision that in the event the applicant is unable to repay the money within the time specified he will cause a corporation to be formed and make application to this Commission for permission to transfer the license of the station to said corporation. If and when said corporation is formed, the applicant will hold 51% of the stock and A. L. Glassman will receive 49% in lieu of the repayment of the loan of \$20,000.00. Sale of stock in the proposed corporation is not contemplated. The entire agreement concerning this loan is shown in a letter dated October 22, 1935, signed by A. L. Glassman, and a letter dated October 23, 1935, signed by the applicant herein. These letters were offered and received in evidence and were marked Applicant's Exhibits 5 and 5A in Docket No. 2980, and by reference made a part of this record.

At the time this application was filed, the applicant had personal property valued at approximately \$2,500.00, and stock in radio station KLO of \$4,000.00.

27 In the event this application be granted it is the intention of the applicant to employ qualified and experienced employees for the various positions to insure the proper operation of the station.

A survey conducted by the applicant, and by a witness at the expense and request of the applicant, concerning the possible advertising support which might be secured for a radio station in Cheyenne, Wyoming, showed the following results: That there are approximately 275 retail stores which sell the various lines of merchandise in Cheyenne, and it is estimated that for the year 1933 the total volume of business for these merchants amounted to approximately seven million dollars. A further estimate is made that since general business conditions have improved materially the volume of business for 1935 would closely approach nine million dollars.

The advertising rates proposed by the applicant would be \$25.00 per month for thirty 100-word spot announcements, \$93.75 per month for 100-word spot announcements five times a day, or a fifteen minute daily program on a monthly basis for \$70.00. It is claimed this will place radio advertising within reach of the medium and small merchant who does not at this time have an opportunity to secure this class of advertising. It is contended the local merchants need such advertising in order to combat the competition of the Denver merchants who advertise over the Denver radio stations. The local merchants in Cheyenne cannot afford to pay the high advertising rates demanded by the Denver stations just to secure coverage in their local trade territory. Such rates would be prohibitive.

Cheyenne is the capital of the State of Wyoming. It is situated in the southeastern portion thereof, approximately twelve miles north of the south line and forty miles west of the east line. The population of Cheyenne is 17,361 (1930 Census), and Fort Warren, which is situated just outside the city, has an estimated population of 4,000. Cheyenne is the headquarters for various mining industries, the United Mine Workers Association and the American Federation of Labor, as well as other organizations. Railroad shops are maintained in the city which employ a considerable number of men. The city has a considerable amount of jobbing business and the surrounding territory is devoted to stock raising and agriculture.

The estimated cost of the proposed station is \$8,890.00, the estimated monthly operating expense is \$1,525.00, and the estimated monthly receipts, predicated upon the result of the survey mentioned above, is \$2,100.00.

A typical program offered in evidence shows that news broadcasts will be given each hour during the time the station is on the air; that weather reports, market and live stock quotations, Police bulletins, Luncheon Club programs, daily devotional services of twenty minutes, high school programs, and other matters of interest to the local community will be broadcast. A survey indicates that ample talent is available locally, both professional and amateur, consisting of bands, orchestras, individual musical artists, vocalists, and sufficient talent is available for the production of dramatic skits. It is proposed to use a considerable amount of local talent in the presentation of programs. In addition to the programs heretofore mentioned, time will be devoted to boy scout programs and on Saturday evening Church news will be broadcast. It is contemplated having a direct line to the Capitol from which matters of interest may be broadcast.

28 No radio broadcast station is now situated in the city of Cheyenne, but Station KOA, Denver, Colorado, 100 miles

distant, operating on 830 kilocycles with power of 50 kilowatts renders acceptable service to the area proposed to be served. However, on occasions this service might be considered as intermittent in character at night, because of the possibility of fading. Some other Denver stations render slight service, and the station at Greeley, Colorado, on occasions, is received. This service, however, would be classed as secondary and not satisfactory.

The result of the survey heretofore mentioned and the testimony of various witnesses who deposed, indicate a need for additional radio service in the area proposed to be served in order that the local merchants may have the advantage of radio advertising.

No interference will be expected with any existing station by the granting of this application.

The night quota due the State of Wyoming is 0.68 unit, and that assigned is 0.40 unit. The night quota due the Fifth Zone is 36.00 units, and that assigned is 46.18 units. The day quota due the State of Wyoming is 1.24 units, and that assigned is 0.40 unit. The day quota due the Fifth Zone is 65.00 units, and that assigned is 58.04 units. The granting of this application would increase the night quota by .1 unit and the day quota by .2 unit.

All equipment and the location of the transmitter and antenna would meet the recommendations and requirements of the Commission.

CONCLUSIONS

The applicant is legally, technically, financially, and otherwise qualified to construct and operate the proposed station. A need for additional service such as proposed by the applicant does exist in the area proposed to be served, and this application may be granted within the purview of Section 307 of the Communications Act of 1934 and the Regulations of the Commission with regard to quota, particularly Rule 6 (f).

The record is silent as to any possible interference with other applications that may be pending from the same state or zone.

The site at which the applicant proposes to construct and operate the station will conform to the Rules and Regulations of the Commission.

The granting of this application would serve public interest, convenience, and necessity.

29

PRELIMINARY STATEMENT

In re: Wyoming Radio Educational Association, Docket No. 2922

This is an application of the Wyoming Radio Educational Association for construction permit to establish and operate a radio station at Cheyenne, Wyoming, on a frequency of 630 kilocycles with power of 500 watts night and 1 KW to local sunset, unlimited time. This application was designated for hearing to determine the issues set out in the Bill of Particulars.

STATEMENT OF FACTS

The Wyoming Radio Educational Association is a loosely formed partnership with forty-three members. The members of the partnership live at different points in the State of Wyoming, but few

of them residing at Cheyenne. All are American citizens. No formal organization has yet been established. A small number of members held a meeting and designated temporary officers as follows: Leslie G. Baker, President; Paul J. Paulsen, Secretary; and E. E. Hanway, Treasurer. The partnership seems to have given Leslie G. Baker carte blanche to proceed to make this application, and it is contemplated, if and when said application be granted, to form a corporation with \$50,000.00 capital stock, and each partner will be issued stock to the amount contributed for the purpose of the preliminary organization and the making of this application, and for any additional amounts which they may contribute to the venture.

Articles of Association, referred to as "Articles of Faith" have been prepared and submitted to the various members, but has not been subscribed in such formal manner as to constitute a binding partnership.

Leslie G. Baker, the Acting President, is a resident of Cheyenne, Wyoming. He has been engaged in newspaper work for the past twenty years, having established and published a newspaper in Kemmerer, Wyoming, and continued to publish said paper until 1932. He has also published a newspaper in Rock Springs, Wyoming. While engaged in newspaper work he was a member and Vice-President of the Wyoming Newspaper Association. He has held public office as Mayor of Kemmerer, and as a Member of the Wyoming House of Representatives.

Mr. Baker will have general supervision of the broadcast station, if and when it is established. He has had no experience in the operation of a radio broadcast station, but proposes to employ qualified and experienced employees for the various positions to insure the proper operation of the station.

The applicant has on deposit the sum of \$15,000.00, which has been contributed by various members of the partnership, but there is no evidence as to who contributed this fund or the amount of the various contributions if there be more than one, nor has any definite arrangement been made for securing additional funds other than the formation of a corporation as heretofore mentioned.

30 The cost of the station complete and ready to go on the air is estimated at \$16,000.00. The operating expense is estimated at \$1,800.00 per month.

Cheyenne, is the capital of the State of Wyoming. It is situated in the southeastern portion thereof, approximately twelve miles north of the south line and forty miles west of the east line. The population of Cheyenne is 17,361 (1930 Census), and Fort Warren, which is situated just outside the city, has an estimated population of 4,000. Cheyenne is the headquarters for various mining industries, the United Mine Workers Association and the American Federation of Labor, as well as other organizations. Railroad shops are maintained in the city which employ a considerable number of men. The city has a considerable amount of jobbing business and the surrounding territory is devoted to stock raising and agriculture.

The applicant expects to use a considerable amount of talent in the presentation of programs, and a survey has determined that there is a sufficiency of talent, both professional and amateur, consisting of the usual musical organizations to be found in cities of the size of

Cheyenne, and dramatic talent for such programs. Newscasts will be given three times each day, and weather and market reports will be broadcast. It is contended that sudden changes in the temperature of the area, ranging from 40 to 50 degrees in a few hours has caused the loss of life on occasions, as well as doing much damage to the livestock industry, and any storm warnings which can be had from the Weather Bureau will be broadcast. Time will be given to the State Highway Patrol, which is expected to be of benefit in law enforcement, apprehension of criminals, and assist in the location of missing persons. A good transcription service will be secured and used in the presentation of programs.

A liberal amount of time will be contributed to educational, religious, civic, and charitable organizations, and four hours a day will be devoted to the dissemination of any information which the membership may desire to broadcast.

Advertising rates will be established which are considered by the applicant to be within the reach of the average merchant and will supply this medium of advertising which is not now available in Cheyenne.

No radio broadcast station is now situated in the city of Cheyenne, but Station KOA, Denver, Colorado, 100 miles distant, operating on 830 kilocycles with power of 50 kilowatts, renders acceptable service to the area proposed to be served. However, on occasions this service might be considered as intermittent in character at night, because of the possibility of fading. Some other Denver stations render slight service, and the station at Greeley, Colorado, on occasions is received. This service, however, would be classed as secondary and not satisfactory.

A thorough consideration of all of the evidence adduced at the consolidated hearing of these two applications indicates that a
 31 need for additional radio service does exist in Cheyenne, Wyoming, and that such additional service would be beneficial to the local merchants in that it would afford them a means of advertising which is not now available.

In the event this application be granted, interference may be expected with three radio stations which are now licensed to operate on the same frequency here applied for, and which are located at less than the recommended distances for nighttime operation; i. e., CJGX at Yorktown, Saskatchewan, 500 watts power, 700 miles distant; WOS, Jefferson City, Missouri, 500 watts power, 680 miles distant; and KFRU, Columbia, Missouri, 500 watts power at night, 670 miles distant. The last two mentioned stations divide time. The recommended separation in each instance is 800 miles. No interference would be expected in the daytime as these stations are in excess of the recommended separation for daytime operation. The simultaneous operation of the applicant station and the three stations mentioned above would result in restricting each station to its 1.5 millivolt per meter contour, and stations of this class are entitled to protection to the one millivolt per meter contour. In the case of Stations WOS and KFRU, it would restrict their primary service area approximately eight miles. Information concerning the population within this affected area is not available. This interference would be considered as serious and objectionable.

Two applications are pending which involve a question of interference if this application be granted, i. e., Station KTFI, Twin Falls, Idaho, for operation on 630 kilocycles with 500 watts power at night, 1 KW to local sunset. The distance between Cheyenne and Twin Falls is 505 miles. Station KFRU, Columbia, Missouri, operating on 630 kilocycles with the present power of 500 watts, to increase hours of operation. The distance between Cheyenne and Columbia is 670 miles. The recommended nighttime separation in each instance is 800 miles.

The equipment proposed to be used is in conformity with the recommendations of the Engineering Department of the Commission, and all recommendations of the Commission would be complied with.

The night quota due the State of Wyoming is 0.68 unit, and that assigned is 0.40 unit. The night quota due the Fifth Zone is 36.00 units, and that assigned is 46.18 units. The day quota due the State of Wyoming is 1.24 units, and that assigned is 0.40 unit. The day quota due the Fifth Zone is 65.00 units, and that assigned is 58.04 units. The granting of this application would increase the night quota by .3 unit, and the day quota by .5 unit, which would make the State over-quota .02 unit for night operation.

CONCLUSIONS

From the evidence adduced concerning the application of the Wyoming Radio Educational Association it is impossible to draw a definite conclusion concerning technical, financial, and other qualifications of this applicant. The only member of the partnership, consisting of forty-three members, to appear being Mr. Baker.

A need for the service proposed to be rendered in the area does exist. The granting of this application would result in making the state .02 unit over-quota for night operation.

The site at which it is proposed to construct and operate the station would meet the requirements of the Commission.

32 The granting of this application would result in serious and objectionable interference with the operation of existing licensed stations, to wit: WOS, KFRU, and CJGX, and would also result in interference with pending applications from Stations KTFI and KFRU.

The granting of this application would not serve public interest, convenience or necessity.

RECOMMENDATIONS

It is accordingly recommended:

1. That the application of Paul R. Heitmeyer for construction permit be granted.
2. That the application of the Wyoming Radio Educational Association for construction permit be denied.

P. W. SEWARD, *Examiner*.

Submitted December 21, 1935.

Released ----- Exceptions due -----

Before the Federal Communications Commission, Washington, D. C.

Docket No. 3161

In the Matter of Paul R. Heitmeyer, Cheyenne, Wyoming. For Construction Permit

Docket No. 2922

Wyoming Radio Educational Association, Cheyenne, Wyoming.
For Construction Permit

Submitted April 23, 1936. Decided June 12, 1936

HEADNOTES

Application for construction permit for new broadcast station denied when, inter alia:

(1) Applicant failed to make such a showing of his financial responsibility as would justify the Commission in granting the application;

(2) A granting thereof would, in effect, prejudice a proposed assignment of license, the application for which is not presently before the Commission.

Application for construction permit to erect a new broadcast station denied when, inter alia, applicant failed to make such a showing of his legal and financial qualifications as would justify the Commission in granting the application.

Financial showing considered insufficient when, inter alia:

(1) Applicant did not personally have the necessary resources;

(2) Financial arrangements were such as to require virtual approval of subsequent application for assignment of station license and showing made of expected profit was insufficient to repay loan within period specified, hence, would leave physical equipment subject to foreclosure for repayment of unsecured loan.

34 Appearances: Clarence C. Dill and J. W. Gum on behalf of Paul R. Heitmeyer;

Orman W. Ewing and George S. Smith on behalf of Wyoming Radio Educational Association;

Horace L. Lohnes, E. D. Johnston, and Fred W. Albertson on behalf of Station KTFI.

Tyler Berry on behalf of the Federal Communications Commission.

STATEMENT OF FACTS AND GROUNDS FOR DECISION

By the Commission:

Broadcast Division, Commissioners Sykes, Chairman; Case and Prall.

This proceeding arose upon the applications of Paul R. Heitmeyer for a construction permit to erect a new broadcast station at Cheyenne, Wyoming, to operate on the frequency of 1210 kc, with power

of 100 watts, 250 watts local sunset, unlimited hours of operation; and of Wyoming Radio Educational Association for a construction permit to erect a new broadcast station at Cheyenne, Wyoming, to operate on the frequency of 630 kc, with power of 500 watts, 1 kw local sunset, unlimited hours of operation.

The Commission was unable to determine from an examination of the applications that the granting thereof would serve public interest, convenience, and necessity, and designated the same for public hearing, pursuant to Section 309 (a) of the Communications Act of 1934, before an examiner appointed by the Commission. Notice of time and place of hearing was given the applicant and other interested parties. Pursuant to said notice, the application was heard before an examiner on October 30, 1935. On December 4, 1935, the Wyoming Radio Educational Association filed a petition to reopen the hearing and grant an order to take depositions, which petition was denied on December 10, 1935. On December 21, 1935, the examiner submitted his report (I-173), recommending that the application of Paul R. Heitmeyer be granted, and the application of Wyoming Radio Educational Association be denied. On January 9, 1936, a joint petition to intervene was filed by the Tribune Publishing Company and the Wyoming Eagle, which petition was denied by the Commission. On January 22, 1936, the Wyoming Radio Educational Association filed exceptions to the Examiner's Report, and a request for oral argument. The exceptions do not raise any questions not necessarily determined from a consideration of the applications upon its merits. On April 26, 1936, oral argument was had before the Broadcast Division of the Commission. On May 1, 1936, the Commission entered its final order denying both applications, effective at 3 A. M., E. S. T., September 29, 1936.

35 Cheyenne, Wyoming, is the capital of the State, and is situated near the southeast corner thereof. The population is 17,361 (census of 1930), and Fort Warren, an Army post situated just outside the city, has an estimated population of 4,000. There are approximately 275 retail stores in the city, which did an estimated total volume of business of approximately seven million dollars in 1933. A number of jobbing establishments are located in the city, and railroad shops employ a considerable number of men. The surrounding territory is devoted principally to stock raising, and in some sections farming is engaged in.

WITH RESPECT TO THE APPLICATION OF PAUL R. HEITMEYER

Paul R. Heitmeyer, applicant herein, testified that he is an American citizen by birth, and is therefore legally qualified to be a licensee. It appears that he has been actively engaged in various capacities in radio broadcasting for about fifteen years, and he is at present employed as Manager for Broadcast Station KLO at Ogden, Utah. The Commission is of the opinion that the applicant is technically qualified.

With respect to the financial qualifications of the applicant, he testified in the hearing on October 29, 1935, in the matter of his application for the Salt Lake City, Utah, station, the record of which was by stipulation incorporated into this record, that he estimated his financial worth to be \$2,500.00. However, on July 15,

1935, he filed a sworn statement, as a part of this application, showing assets of \$7,271, with liabilities of \$474. Mr. Heitmeyer testified that a deposit had been placed to his credit by Mr. A. L. Glasman, who, it appears, is publisher of the Ogden Standard Examiner, and who also owned the controlling interest in Interstate Broadcasting Corporation, licensee of Station KLO at Ogden, Utah. The deposit was made by Mr. Glasman as a loan to Mr. Heitmeyer for the construction and operation of two broadcast stations, namely, the proposed station applied for herein, and another station at Salt Lake City, Utah (Docket 2980).

The record discloses further that the applicant intends, in the event this application, and the one for a construction permit for the station at Salt Lake City, Utah, are granted, to form a corporation for each station and request the consent of the Commission to assign the licenses of said stations to the corporations. Under the terms of the agreement between Mr. Glasman and Mr. Heitmeyer by which the loan was made, Mr. Heitmeyer agreed to pay 6% interest on the principal, and to repay the loan within five years. However, in the event the loan is not paid under those terms, Mr. Heitmeyer is obligated to assign to Mr. Glasman 49% of the stock of the proposed licensee corporations. It also appears that the estimated cost of constructing the proposed station is \$8,890, and the estimated monthly operating expenses are \$1,525. The record is silent as to the estimated monthly revenue expected from the proposed station. Mr. Heitmeyer testified that he intends to reside in Salt Lake City, Utah, and leave the management of the requested station in Cheyenne to an employee and that he will visit the station ten or twelve days per month. He further testified that he had interviewed various residents of Cheyenne and found the sentiment favorable to having a radio station in that city, except that the publishers of the two newspapers very definitely objected to the proposed station.

36 Upon the record before us, it is clear that the applicant personally is not financially able to construct and operate the proposed station, and that he intends to construct and operate the same, if permitted so to do, entirely on money which he has borrowed, without security, unless it be considered that the requirements for the formation of a new corporation, to whom assignment will be requested, and distribution of 49% of the stock to Mr. Glasman, is security for the loan. If it be so considered, then it is clear that the applicant has failed to show that he is financially qualified to construct and maintain a station of the kind and class applied for, since the loan is conditioned upon approval by the Commission of two applications when filed for assignment of license, which would in effect be a prejudging of those applications, which are not now before the Commission. Manifestly, the Commission is without power under the Communications Act of 1934 to act upon applications not presently before them, nor is it within the spirit of the Act to grant an application when it is apparent that the financial structure is dependent, not upon the applicant, but upon some future unpredictable happening. If it be considered that this stock is not security for the loan, then it is apparent that the applicant has made no sufficient showing of financial responsibility, since the physical equipment of this station may become subject to lien, foreclosure, and seizure by the

lender, as a matter of law, in the event the loan is not repaid within the five year period. On the record before us, the applicant must pay back \$20,000, with interest at 6%, in five years, or something over \$4,000 per year. The Commission is of the opinion, and so found, that the applicant has not made such a showing of his financial responsibility as would justify the Commission in granting the application applied for.

WITH RESPECT TO THE APPLICATION OF WYOMING RADIO EDUCATIONAL
ASSOCIATION

The Wyoming Radio Educational Association is an unincorporated association with forty-three members, all of whom are, according to the testimony, American citizens. The membership dues of the Association are twenty-five dollars for the first year and ten dollars per year thereafter, and a number of the members have not paid dues. Those eligible to membership are educators or persons directly or indirectly interested in educational matters, living within the State of Wyoming, and the membership is limited to one hundred. Some of the objects and purposes of the Association are: "To protect and defend the rights of the common people in radio matters. To promote and elevate the standards of radio broadcasting programs. * * * etc." The "purposes" of the Association do not include the ownership and operation of a broadcast station.

At a meeting of five members, Mr. Lester G. Baker was elected President, and he later appointed Paul J. Paulsen as Secretary, and E. E. Hanway as Treasurer. Articles of Association were adopted without being read by the membership, according to the testimony of Mr. Baker. It appears that the applicant has \$15,000 on deposit, which sum has been contributed by various members, but the record is barren of any information which would indicate who contributed the money and under what conditions and restrictions.

Mr. Baker testified that a corporation would be formed to be licensee of the proposed station, and that the members of the Association would be given the first opportunity to purchase stock in the corporation to be formed.

The Communications Act of 1934 requires that the Commission grant applications for broadcast facilities only when public interest would be served by such grant. Pursuant thereto, the Commission requires that an applicant show affirmatively that he is legally, technically, financially, and otherwise qualified to construct and operate a station of the kind and class applied for. It is clear from this record, and the Commission so finds, that the applicant has not made such a showing of its legal and financial qualifications as would justify the Commission in granting the application.

The applicants, Paul R. Heitmeyer and Wyoming Radio Educational Association, both introduced considerable testimony relative to the need for a broadcast station in Cheyenne; the talent available there; and other matters, all of which has been carefully considered by the Commission, but as the showing made by both applicants precludes a grant of either application in any event, it is deemed unnecessary to discuss in detail such showing herein.

After careful consideration of the applications, the evidence adduced at the hearings, the Examiner's Report and the exceptions

thereto, and the oral argument, the Commission was of the opinion, and so found, that the public interest, convenience and necessity would not be served by granting the applications. Accordingly, on May 1, 1936, the Commission entered its final order denying the applications of Paul R. Heitmeyer and Wyoming Radio Educational Association, effective at 3 A. M., E. S. T., September 29, 1936. The effective date of this order was later advanced to June 12, 1936.

38

Temporary restraining order

Filed May 31, 1938

* * * * *

Upon consideration of the allegations of the verified Bill filed in the above entitled cause and it appearing from said verified Bill that immediate and irreparable injury, loss and damage will result to the plaintiff before a notice can be served and a hearing had on the application for a temporary restraining order contained in said Bill of Complaint if the defendants above named, or any of them, carry out the terms of the order and notices of hearing as set forth by Exhibits "A" and "B" in the Bill, namely to require plaintiff to file his appearance, statement of facts, and desire to be heard on or before June 1st, 1938, on penalty of being declared in default without right of further consideration of his application upon which hearing, decision, appeal and reversal of decision have already been had and it appearing that no injury or loss will result to defendants from the issuance of this order.

Now therefore, on Motion of the plaintiff it is this 31st day of May, 1938, at 2:30 o'clock, P. M.

Adjudged, ordered, and decreed that the defendants, Frank R. McNinch, T. A. M. Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul A. Walker, and Norman Case as Commissioners of the Federal Communications Commission, Washington, D. C., and each of them are restrained from allowing any procedural steps under the law and rules of the Federal Communications Commission to be taken on the application of Paul R. Heitmeyer for a new station at Cheyenne, Wyoming; from accepting any pleadings thereon, either from the applicant or any other party; from taking any steps toward the execution of the Order of the Federal Communications Commission as set forth in Exhibit "A" of the Bill of Complaint as it

39 relates to this plaintiff; from doing any and all things that may possibly prejudice the rights of this plaintiff in any way;

Provided, however, that the plaintiff, Paul R. Heitmeyer, first gives security in the sum of \$100 in form and manner required by the rules of this Court; and it is further

Adjudged, ordered, and decreed that this temporary Order remain in effect until and including the 2nd day of June, 1938, or until further order of this Court, and that the application for preliminary injunction contained in the Bill of Complaint herein is set down for hearing at 10 o'clock A. M. on the 2nd day of June, 1938, or as soon thereafter as counsel can be heard.

PEYTON GORDON, *Justice.*

Marshal's return

Served a copy of the within rule on the within named defendants as follows: T. A. M. Craven, personally, 6-1-38; Eugene O. Sykes, personally, 6-1-38; Thad H. Brown, personally, 6-1-38; Paul A. Walker, personally, 6-1-38; and Norman Case, personally, 6-1-38; Frank R. McNinch and George H. Payne are each not to be found, 6-1-38.

JOHN B. COLPOYS,
U. S. Marshal in and for the Dist. of Columbia.
 By H. C. ALLEN,
Deputy U. S. Marshal.
 K.

40

Motion to dismiss

Filed June 7, 1938

* * * * *
 Now come Frank R. McNinch, T. A. N. Craven, George H. Payne, Eugene O. Sykes, Thad H. Brown, Paul A. Walker, and Norman Case, as Commissioners of the Federal Communications Commission, and move the Court to dismiss the Bill of Complaint for Injunction *pendente lite*, and permanently, Rule to Show Cause, and other relief, and respectfully show the Court:

1. Said Bill of Complaint for Injunction on file herein does not set forth facts sufficient in equity to constitute a cause of action;
2. Said Bill of Complaint is defective in that no facts appear therein from which it may be shown that plaintiff is or will be irreparably injured by the acts of defendants of which he complains;
3. That plaintiff has a plain, speedy, and adequate remedy at law;
4. In any event it appears from the face of the Bill of Complaint on file herein, that the matter of which plaintiff complains is *res adjudicata*;
5. For other reasons apparent of record which will be argued at the hearing.

FRANK R. McNINCH, ET AL,
As members of the Federal Communications Commission.
 By HAMPSON GARY,
 (F N)
 W. H. BAUER,
 FANNEY NEYMAN,
Counsel for Defendants.

41

Order

Filed June 30, 1938

* * * * *
 This cause came on to be heard on the Motion of the Defendants to Dismiss at this term; and thereupon, upon consideration thereof, it is this 30th day of June, 1938,

Adjudged, ordered, and decreed that the Motion to Dismiss be and the same is hereby denied.

PEYTON GORDON, *Justice.*
 Dated this 30th day of June 1938.

Stipulation

Filed June 30, 1938

* * * * *

It is stipulated by plaintiff and defendants, through their counsel,
 A. That the hearing scheduled by the Federal Communications Commission to be heard before an examiner upon the applications of (1) Paul R. Heitmeyer for a construction permit to erect a new radiobroadcast station at Cheyenne, Wyoming, and (2) Frontier Broadcasting Company for a construction permit to erect a new radiobroadcast station at Cheyenne, Wyoming, be postponed until a reasonable time after final decision of the Courts on the merits of the Bill of Complaint on file herein.

B. Defendants agree to withhold approval from any other application which might preclude the construction and operation of plaintiff's proposed radio station pending final decision of the Courts on the merits of the Bill of Complaint on file herein.

C. Defendants agree that, in the event their contention is sustained by the Courts, plaintiff may file his appearance, statement of facts, and desire to be heard, and that defendants will allow plaintiff twenty days from and after the final disposition of this case in the Courts, within which so to do.

43 D. Plaintiff agrees, pending final determination of this proceeding, not to insist upon a preliminary injunction or restraining order in so far as the prohibition of any hearing upon plaintiff's application, or the withholding of approval of any other application which might preclude the construction and operation of plaintiff's proposed radio station is concerned.

PAUL R. HEITMEYER,

Ogden, Utah,
Plaintiff,

By JAMES W. GUM,

His Counsel.

FRANK R. McNINCH, ET AL.,

As Members of the Federal Communications Commission,

Defendants,

By HAMPSON GARY, Their Counsel.

Order allowing special appeal

Filed August 2, 1938

United States Court of Appeals for the District of Columbia

No. 2932 Original. April Term, 1938

Equity No. 67,291

FRANK R. McNICH, T. A. M. CRAVEN, GEORGE H. PAYNE, ET AL., AS
COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

VS.

PAUL R. HEITMEYER

On consideration of the petition for allowance of a special appeal herein from the order of the District Court of the United States for the District of Columbia entered therein on June 30, 1938, by Mr. Justice Peyton Gordon, It is ordered by the Court that the said petition be, and it is hereby, granted, and a special appeal allowed as prayed, under the terms of the order filed this day in No. 7016, Pottsville Broadcasting Co. v. Federal Communications Commission.

Per Mr. Chief Justice Groner,

July 27, 1938.

A true Copy,

Test:

[SEAL]

JOSEPH W. STEWART,
*Clerk of the United States Court
of Appeals for the District of Columbia.*

Assignments of error

Filed August 2, 1938

* * * * *

Now come the defendants in the above-entitled cause and file the following Assignments of Error upon which they will rely upon their prosecution of Special Appeal in the above-entitled cause, from the Order made by this Honorable Court on the 13th day of June A. D. 1938.

The Court erred:

1. In failing to dismiss the Bill of Complaint.
2. In failing to grant defendants' Motion to Dismiss.
3. In failing to find the plaintiff's Bill of Complaint for Injunction is insufficient on its face to constitute a cause of action in equity.
4. In failing to find that plaintiff has an adequate remedy at law.
5. In failing to find that the question of the defendants' compliance with the mandate of the United States Court of Appeals for the District of Columbia in Cause No. 6762, Paul R. Heitmeyer v. F. C. C., has already been passed upon by that Court and is therefore res adjudicata.
- 46 6. In failing to find that plaintiff's Bill does not show that he is or will be irreparably injured.

7. In failing to find that it has no power to control the discretion of an administrative body vested by statute with such discretion.

8. In other respects apparent of record.

HAMPSON GARY,
General Counsel.

W. H. BAUER,
Acting Assistant General Counsel.

FANNY NEYMAN,
Assistant Counsel.

ACKNOWLEDGEMENT OF SERVICE

Receipt is acknowledged of the foregoing Assignments of Error
this 2nd day of August A. D. 1938.

JAMES W. GUM,
Attorney for Plaintiff.

47 *Designation of record*

Filed August 3, 1938

* * * * *

Now come the defendants in the above-entitled cause and request the Clerk to prepare a Transcript of the Record herein for submission to the United States Court of Appeals for the District of Columbia, and to include in that Transcript the following:

1. Bill of Complaint for Injunction, and Exhibits attached thereto.
2. Temporary Restraining Order.
3. Appellants' Motion to Dismiss Bill of Complaint for Injunction.
4. Order of Mr. Justice Peyton Gordon, dated June 30, 1938, denying Appellants' Motion to Dismiss Appellee's Bill of Complaint for Injunction.
5. Stipulation between Appellants and Appellee.
6. Order of the United States Court of Appeals for the District of Columbia granting Defendants' application for Special Appeal.
7. Appellants' Assignments of Error.
8. This Designation.

HAMPSON GARY,
Counsel for Defendants-Appellants.

48 ACKNOWLEDGMENT OF SERVICE

Service of the within and foregoing Designation of Record acknowledged and a copy thereof received this 3rd day of August A. D. 1938.

JAMES W. GUM,
Counsel for Plaintiff-Appellee.

49 District Court of the United States for the District of
Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing

pages numbered from 1 to 48, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 67291 in Equity, wherein Paul R. Heitmeyer is Plaintiff and Frank R. McNinch et al., as Commissioners of the Federal Communications Commission, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of August 1938.

[SEAL]

CHARLES E. STEWART,
Clerk.

By CHAS. D. COFLIN,
Assistant Clerk.

[Endorsement on cover:] No. 7228. McNinch et al., Appellants vs. Heitmeyer. United States Court of Appeals for the District of Columbia. Filed Aug. 15, 1938. Joseph W. Stewart, Clerk.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED DEC 2-1938

Joseph W. Stewart

CLERK

No. 7228—Special Calendar

In the United States Court of Appeals
for the District of Columbia

FRANK R. MCNINCH, T. A. M. CRAVEN, GEORGE H.
PAYNE, ET AL., AS COMMISSIONERS OF THE FEDERAL
COMMUNICATIONS COMMISSION, APPELLANTS

v.

PAUL R. HEITMEYER

BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. DEMPSEY,
Acting General Counsel.

WM. H. BAUER,¹
Acting Assistant General Counsel.

ANDREW G. HALEY,
Assistant Counsel.

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In the United States Court of Appeals for the District of Columbia

No. 7228—SPECIAL CALENDAR

**FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H.
PAYNE, ET AL., AS COMMISSIONERS OF THE FEDERAL
COMMUNICATIONS COMMISSION, APPELLANTS**

v.

PAUL R. HEITMEYER

BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION

A. STATEMENT OF THE CASE

I. Statement of the Proceedings in the District Court

This special appeal (R. 30) was taken on August 2, 1938, by the Federal Communications Commission¹ from an order of the District Court of the United States for the District of Columbia (Mr. Justice Gordon) (R. 28) denying the Commission's motion to dismiss the appellee's Bill of Complaint (R. 1-27).

Said Bill of Complaint (R. 1-27) was filed in the District Court on May 31, 1938 (R. 1). On the same day Mr. Justice Gordon issued against the

¹ Hereinafter referred to as the Commission.

Commission a temporary restraining order (R. 27). On June 7, 1938, the Commission filed a motion to dismiss the Bill of Complaint (R. 28). Thereafter, on June 30, 1938, Mr. Justice Gordon issued his Order denying the aforesaid motion (R. 28). On the same day the Commission and the appellee filed a stipulation whereby the Commission agreed not to take further action with regard to the applications involved in the Bill of Complaint until final determination of the proceedings (R. 29). Thereupon this special appeal was filed.

II. The facts

On March 25, 1935, the appellee filed with the Commission an application to establish a new radiobroadcast station at Cheyenne, Wyoming (R. 3). This application was heard by an examiner on October 29 and 30, 1935, in consolidation with the application of the Wyoming Radio Educational Association also to establish a radiobroadcast station at Cheyenne, Wyoming (R. 16-22). On June 12, 1936, the Commission issued its Statement of Facts, Grounds for Decision, and Order, denying both applications (R. 23-27). On June 29, 1936, the appellee appealed to this Court from said decision, and on December 27, 1937, this Court reversed the Commission's decision (R. 4, 5). On March 3, 1938, the Commission vacated its order denying the application of appellee and directed that further proceedings be had thereon in accord-

ance with the opinion and mandate of this Court (R. 5). On April 6, 1938, the appellee filed with the Commission a petition to make a final decision on the record "as it now stands" (R. 5-6). On April 20, 1938, the Commission denied the foregoing petition (R. 6) and in addition entered the following Order:²

At a meeting of the Federal Communications Commission, held at its offices in Washington, D. C. on the 20th day of April 1938.

The Commission, having on March 2, 1938, vacated its order of May 1, 1936, denying the application of Paul R. Heitmeyer, and the related Statement of Facts and Grounds for Decision, pursuant to and in conformity with the certified copy of Opinion and Judgment of the United States Court of Appeals for the District of Columbia in No. 6762, *Paul R. Heitmeyer v. Federal Communications Commission*.

It is ordered, that the Record in this case be reopened for further hearing, such further hearing to be held before an Examiner and consolidated with a hearing de novo this day ordered upon the application of the Frontier Broadcasting Company (File No. B5-P-1339), and a hearing this day ordered upon the application of Cheyenne Radio Corporation (File No. B5-P-1499).³

² Hereinafter referred to as the Order of April 20, 1938.

³ The Cheyenne Radio Corporation application has since been dismissed and no further reference will be made thereto.

A copy of the notice of hearing containing a Bill of Particulars in each of these cases is attached hereto and hereby made a part of this order (R. 2-3).

On April 29, 1938, the Commission issued notices of hearing on each of the applications listed above to the respective applicants (R. 3), said hearing to be held on July 6, 1938.

On April 27, 1938, the appellee filed in this Court a motion asking for a Rule upon the Federal Communications Commission to show cause "why it had not complied with the judgment" of this Court. Said motion was denied by this Court on May 12, 1938 (R. 6).

On May 18, 1938, the appellee filed with this Court a motion "for a Stay of Mandate and Stay of Proceedings by the Federal Communications Commission while plaintiff would prepare and file a petition for Writ of Certiorari by the Supreme Court." This motion was also denied by this Court on May 23, 1938 (R. 6).

On May 31, 1938, the appellee filed his Bill of Complaint in the District Court, setting forth the foregoing facts and praying that the Commission be enjoined and restrained from holding the hearing shown in its order of April 20, 1938, and that the Commission be permanently enjoined from granting any construction permit or license "to any other applicant for a radio station at Cheyenne, Wyoming, until after they have rendered a decision on the record as made at the said hearings of

the application of plaintiff" (R. 9). The appellee also prayed that the Commission "be ordered and directed to execute and carry into effect the judgment and decree of the Court of Appeals of the District of Columbia in that certain action entitled Paul R. Heitmeyer, Plaintiff, versus Federal Communications Commission, Number 6762, April Term, 1936, by making corrected Findings of Facts and Grounds for Decision and a final decision thereon in accordance with and upon the record in said case as made and presented in said Court of Appeals of the District of Columbia" (R. 9, 10).

On June 7, 1938, the Commission moved to dismiss appellee's Bill because of lack of jurisdiction in the District Court and because the matter complained of was *res adjudicata* (R. 28).

The Commission's Motion to Dismiss having been denied, this appeal was taken, and there was assigned as error the lower Court's action in assuming jurisdiction and in failing to find that the question of the Commission's compliance with the mandate of this Court in Cause No. 6762 had been passed upon already by this Court and was therefore *res adjudicata* (R. 30).

B. THE ISSUES

The first question presented concerns the jurisdiction of the District Court to entertain the Bill. We maintain that the District Court did not have jurisdiction, as Section 402 (b) of the Communica-

tions Act of 1934⁴ (48 Stat. 1093; 50 Stat. 197) provides for appeals to this Court by any applicant whose application for radiobroadcast facilities is refused by the Commission. This, we assert, is the appellee's remedy if its application is finally refused. Moreover, assuming that an opinion and mandate of this Court should direct the Commission to do some specific thing, and totally divest the Commission of discretion (which is certainly not the case here), then the remedy is by application for mandamus to *this Court*. In any event the Court below lacks jurisdiction.

The Commission asserts that the foregoing considerations should have impelled the Court below to dismiss the Bill. The Commission's position was fortified by the fact that Heitmeyer had made application (prior to filing his Bill in the District Court) for a Rule to Show Cause in this Court, which set forth his contentions urged below. This Court denied the Rule, and the matter thus became *res adjudicata*. By assuming jurisdiction the lower Court, in effect, reversed the ruling of this Court. We maintain that this action was legally untenable.

Determination of the above issues should be conclusive of the case. The Commission, however, is prepared to show the full legality of the procedural steps taken in this proceeding. Briefly stated, the

⁴ The Communications Act of 1934 will hereinafter be referred to as "the Act."

appellee desires the Commission to pass upon its application on the record made some years ago, and he does not want the Commission to hold a further hearing on his application together with other pending applications. The Commission maintains that it necessarily has the power to proceed in accordance with its order of April 20, 1938 (set forth *in extenso* above).

C. ARGUMENT

I. The Court below did not have jurisdiction to entertain the appellee's Bill of Complaint

It is fundamental in a case such as this that the test as to whether or not the District Court had jurisdiction to entertain the Bill of Complaint under Section 267 of the Judicial Code (36 Stat. 1163) is threefold. First, does the appellee have a plain, speedy, and adequate remedy at law; second, is the appellee irreparably injured by the action of the Commission complained of; and, third, will injunction lie to control the administrative discretion of the Commission. If these factors must be resolved against the appellee, then the Court below not only should have dismissed the Bill for want of jurisdiction, but in the broader sense the appellee's resort to equity should be defeated because of an inherent lack of equity in his cause. We submit that the District Court did not have jurisdiction to entertain the Bill and that the cause is essentially lacking in equity.

1. Appellee has a plain, speedy, and adequate remedy at law

The appellee's application having been denied on May 18, 1937, he appealed and this Court reversed the Commission on the point that the evidence with respect to the financial qualifications of the appellee would not sustain the Commission's finding that he was not financially qualified and, therefore, the Commission's decision in this respect was arbitrary and capricious. The Commission's decision was reversed (and as we will show later, the reversal wholly vacated the Commission's decision for all purposes), with instructions to proceed with the application in conformity with the Court's opinion. The Court specifically said that its reversal did not mean that the Commission was directed to issue a permit to the appellee. Upon receipt of the Court's mandate reversing its decision, the Commission on March 2, 1938, vacated its order denying the application of appellee and directed that further proceedings be had thereon in accordance with the opinion and mandate of this Court.

On April 6, 1938, the appellee filed with the Commission a petition to make a final decision on the record "as it now stands." This petition was denied by the Commission. The Act provides that if upon examination of any application for a station license the Commission is unable to determine that the granting thereof will serve public interest, it shall fix and give notice of a time and place for

hearing thereon (Section 309 (a), 48 Stat. 1085). The Commission could not determine from the record made in this case that Heitmeyer's application should be granted. The Court had directed the Commission to proceed with the application and the only course remaining was to provide for a further hearing. The burden of the appellee's complaint is that the Commission should have considered the existing record anew, and that in any event the further hearing should not be consolidated with the hearing *de novo* ordered on the application of the Frontier Broadcasting Company. We will discuss this aspect of the case later. Whether or not the Commission erred in taking this action did not in any way operate to confer upon the appellee a right to have recourse to injunctive relief.

It is the appellee's contention that the Commission failed to abide by the mandate of the Court. If such were the fact, the appellee had two remedies at law. As was said in *B. & O. R. R. Co. v. U. S.*, 279 U. S. 781, 785 (1929), "when a lower Federal court refuses to give effect to or misconstrues a mandate, its action may be controlled by this Court either upon a new appeal or by writ of mandamus." The appellee knew full well that these were his remedies, as is shown by the fact that he twice applied to this Court without success for relief in the nature of writs of prohibition and mandamus.

The circumstances of the first attempt by the appellee to obtain relief in the nature of prohibition and mandamus are as follows:

While the Heitmeyer case was pending appeal, and on January 25, 1937, the Frontier Broadcasting Company filed an application (Docket No. 4318) for a new station at Cheyenne, Wyoming.

On January 15, 1938, Heitmeyer filed with this Court a "Petition to Stay," in which he pointed out the pendency of the foregoing conflicting applications and stated:

Under the present rules and regulations, and practice before the Federal Communications Commission, all pending applications which conflict with appellant's application may be heard and decided by the Commission, possibly before appellant's case is finally decided. The population of the City of Cheyenne was 17,361 (1930 Census). At present the population is estimated to be 22,500. Consequently, it is very doubtful if the City is large enough to support two stations.

On January 20, 1938, this Court granted the Stay, whereupon, on March 3, 1938, the Commission filed a Motion to Vacate the Stay Order on the grounds:

4. That the Opinion and Judgment of this Court instructed the Commission that in its further action it should "respect and follow the determination of the questions of law

by the Court" but did not direct the Commission to issue a permit to the appellant.

5. That the Commission, in the exercise of its discretion and judgment, under the Communications Act of 1934, can grant a construction permit only "if public convenience, interest, or necessity will be served by the construction of the station," and in deciding the merits of appellant's application, should not be precluded from considering all pending applications on a comparative basis as affecting the public convenience, interest, or necessity, and should be enabled to reopen the record in this case for the purpose of obtaining additional evidence, if necessary, and considering all material facts which may be necessary to a final determination of the issues involved, even though occurring subsequent to the making of the original record herein.

The Motion to Vacate was vigorously opposed by Heitmeyer on the same theory advanced in his Bill of Complaint herein. On March 17, 1938, however, this Court granted the Commission's Motion to Vacate the Stay Order of January 20, 1938.

The circumstances of the *second occasion* are as follows: Twenty days after this Court vacated the aforesaid Stay Order, Heitmeyer filed a "Motion for Rule to Show Cause." Looking through form to substance this Motion was in reality a petition for writs of prohibition and mandamus, and raised the identical questions raised in the Bill of Complaint herein.

On April 30, 1938, the Commission filed an Opposition to the said Motion for a Rule to Show Cause, and on May 12, 1938, this Court denied said Motion.

Thus, the appellee was not only fully mindful of his immediate remedy at law, but he had recourse to this remedy on two occasions. The Bill of Complaint also shows that the appellee did not exhaust his immediate remedy at law because on May 18, 1938, six days after this Court denied appellee's petition for the aforesaid rule, he filed with this Court a motion "for a Stay of Mandate and a Stay of Proceedings before the Federal Communications Commission while plaintiff [appellee] would prepare and file a petition for Writ of Certiorari before the Supreme Court." This motion was promptly denied by this Court on May 23, 1938. For reasons not of record, the appellee did not proceed with his petition to the Supreme Court, but instead sought equitable relief in the District Court.

The appellee contended in his Bill of Complaint that he had "exhausted all his remedies at law." Nevertheless, the same Bill shows on its face that he had not proceeded to test his legal rights in the Supreme Court. The record of his attempt to invoke the extraordinary legal remedies clearly shows that the substance of his complaint became *res adjudicata* as to the lower court in view of the decisions thereon of this Court.

Besides the immediate remedy of recourse by appeal or mandamus in this Court to test the Com-

mission's interpretation of this Court's mandate, the appellee has available to him the right of appeal provided by Section 402 (b) (1) of the Act (48 Stat. 1093) from any decision of the Commission refusing his application. No matter how involved the reasoning, no argument may be advanced which would show that this appeal at law is not available to the appellee. Both the court below and this Court have ruled time after time that the right of appeal afforded by Section 402 (48 Stat. 1093; 50 Stat. 197) is a plain, adequate, and complete remedy at law. *Black River Valley Broadcasts v. Frank R. McNinch et al.* (decided November 21, 1938); *Sykes v. Jenny Wren*, 64 App. D. C. 379, 78 F. (2d) 729 (1935); *Monocacy Broadcasting Company v. Prall*, 90 F. (2d) 421 (1937). See also *White v. Federal Radio Commission*, 29 F. (2d) 113, 115 (1928), certificate dismissed 282 U. S. 367 (1931); *United States v. American Bond and Mortgage Co.*, 31 F. (2d) 448, 458 (1929), affirmed 52 F. (2d) 318, 320 (1931), certificate dismissed 282 U. S. 374 (1931).

In a recent case the Court below (per Mr. Justice Jennings Bailey) again voiced the rule: "Only in a very extreme case is a District Court justified in reviewing an interlocutory order of another court or of a board with quasi judicial powers by an injunction to restrain further proceedings, where Congress has vested in the Circuit Court of Appeals the jurisdiction to review all proceedings

after a final hearing.” *Resources Corporation International v. Securities and Exchange Commission*, 24 F. Supp. 580 (1938).

2. The appellee is not irreparably injured by the action of the Commission complained of

We have pointed out that the Commission could not determine that granting the application of the appellee would serve the public interest, convenience, and necessity on the basis of the record before it. Whether or not the Commission committed any error in ordering the further hearing to be held in consolidation with the hearing *de novo* on the application of Frontier Broadcasting Company is a question of law which it is the duty of this Court to pass upon under Section 402 (e) of the Act (48 Stat. 1093).

By its action in reversing the decision of the Commission in the original Heitmeyer proceedings, this Court vacated the Commission's Order denying appellee's application, and the case is now before the Commission to proceed anew and to abide by the "law of the case" set forth in this Court's opinion.

No presumption whatsoever may be drawn from the Commission's Order of April 20, 1938, that the application of Heitmeyer will be either granted or denied. The Court found that the Commission's former conclusions as to the financial disqualifications of Heitmeyer were not supported by proper

findings. The showing already made by Heitmeyer is not eliminated by the Commission's Order. The Commission will abide by the law of the case. No order has been entered refusing Heitmeyer's application. So far as the proceedings go, the Commission has not yet found that the application should be granted or denied.

There is no basis for enjoining the action of the Commission on the mere apprehension that it will not do its duty or follow the law. The appellee is not entitled to equitable relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted and the time is ripe to take an appeal to this Court under the statute providing therefor. This principle is so definitely established in *Black River Valley Broadcasts v. Frank R. McNinch et al.* (Decided November 21, 1938), as to need no further comment.

3. Injunction will not lie to control the administrative discretion of the Commission

In his Bill of Complaint, the appellee requested the lower court to enjoin and restrain the Commission from carrying into execution and effect its Order of April 20, 1938, and from granting any construction permit or license to any other applicant for a radio station at Cheyenne, Wyoming, until after the Commission had rendered a decision on the record as heretofore made on the appellee's application. The appellee also requested the lower court to declare the Commission's Order of April

20, 1938, null and void, and to direct the Commission to make "corrected findings of facts and grounds for decision and a final decision" on his application.

We will discuss hereinafter the legality of the Commission's action as set forth in the Order of April 20, 1938, and we will show that the Commission necessarily has the power to take such action. This Court recognized that the Commission must be free to proceed in this case in a manner addressed to the Commission's sound discretion. In its decision in the *Heitmeyer* case, this Court pointed out, after reversing the Commission: "This does not mean that it is directed to issue a permit to the applicant. It is not the function of this court 'to reverse the action of the Commission from an administrative standpoint and to make an administrative judgment. * * * The Commission in its further action is to respect and follow the * * * determination of the questions of law' by this court." The foregoing language expresses the pivotal point of the case; and the doctrine expressed therein was well recognized by this Court in its subsequent actions upon the various motions filed by Heitmeyer and heretofore discussed.

We have frequently adverted to the fact that when the court reversed the Commission's former decision, that decision was vacated for all purposes with the exception that the Commission must follow the "law of the case" as laid down by this

Court. No order then remained for or against the appellee.

The Commission necessarily had full power to proceed, therefore, and the court in its remand specifically told the Commission to proceed. By no process of reasoning can it be assumed that the Commission was precluded from taking further administrative action upon the application, and this the court specifically discerned. We will discuss hereinafter the necessity for the further proceedings ordered, but we maintain at this time that the Commission in the exercise of its sound discretion had full power to require the further hearing. It is well settled that the lower forum has full power to consider and determine any questions or matters which an opinion and a mandate of a reviewing court leaves open and undisposed. It is also well settled that the exercise of sound discretion vested by law in an administrative tribunal is not subject to control by injunction. These principles have been reiterated often by this Court. See *Black River Valley Broadcasts v. Frank R. McNinch et al.* (decided Nov. 21, 1938).

4. The Court below erred in not dismissing the Bill because the question of the Commission's compliance with the mandate of this Court in *Heitmeyer v. Federal Communications Commission* has already been passed upon by this Court and is, therefore, res adjudicata

We have already set forth the facts with regard to the appellee's two applications to this Court for Writs of Mandamus and Prohibition and we have

shown that the contentions raised by the appellee in those instances are the same as those urged in the Bill of Complaint in the lower court. This Court denied both of these applications and, therefore, the questions presented have become *res adjudicata*.

This Court has repeatedly held that a party cannot escape the bar of a judgment against him by bringing a new suit on the same cause of action, but in a different form of action or proceeding. See, e. g., *Great Atlantic and Pacific Tea Company v. West*, 56 App. D. C. 103, 104, 10 F. (2d) 898 (1926); see also *Walker v. Gish*, 51 App. D. C. 4, 5, 273 Fed. 366 (1921); *Donner Steel Company v. Interstate Commerce Commission*, 8 F. (2d) 905, 906 (1925); *Hines, Director of the United States Veterans' Bureau, v. Welch*, 57 App. D. C. 371, 376, 23 F. (2d) 979 (1928).

"It is a well-established rule that the decision of an appellate court is the law of that case on the points presented, to be followed in all subsequent proceedings in that case, in both the trial and the appellate court." *Aetna Life Insurance Company v. Wharton*, 63 F. (2d) 378, 379 (1933).

The District Court erred under its own holdings, as may be found in *Welch v. Hines*, 55 W. L. R. 186: "The doctrine of *res adjudicata* is to be applied whenever the adjudication takes place in a proceeding in which the parties and the issues are the same, or substantially the same, as in the later

proceeding in which the doctrine is invoked; and it is not essential that the cause of action in the two proceedings shall be the same." (The quotation is from Torbert, *D. C. Digest, 1st Suppl. 364*).

II. The proceedings before the Commission have been in complete conformity with the law and rules

As the lower court lacked jurisdiction to entertain the appellant's Bill of Complaint, *for this reason alone* the decision of the lower court denying the motion of the Commission to dismiss the Bill should be reversed and the cause remanded with instructions to sustain the motion and dismiss the Bill.

When the Commission applied to this Court for a special appeal in this case the request was granted (R. 30) on the condition that it be consolidated for hearing with the petitions for mandamus and prohibition in *Pottsville Broadcasting Company v. Federal Communications Commission* (No. 7016) because the two cases "present together a procedural question of importance which should be settled." Thereafter, the Commission petitioned the Court to separate the causes for hearing, but this petition was denied.

It is the Commission's duty, therefore, to inform this Court concerning the procedural steps taken in this proceeding, and to show that the Commission has full power to promulgate the procedural orders in question.

In licensing radiobroadcast facilities the Commission is immediately faced with two main problems. The first is to authorize facilities which will best serve the public interest, convenience, and necessity. The public interest is necessarily paramount, as the Commission is disbursing public gratuities to licensees who use them as trustees for the public rather than as owners. The second duty facing the Commission is to afford a fair hearing to all applicants for these facilities and to see that their applications are given fair and equitable consideration and action.

It is unnecessary to discuss the first problem, save in specific aspects, as it touches upon all of the matters which weighed heavily upon Congress when it enacted the Act. In adopting the Act, Congress had in mind the regulation of facilities which were to be devoted primarily to public use. And the standard of regulation was designed to provide for constant change so that the public would be assured of the best service available.

In granting or refusing licenses the Commission is required to act "as public convenience, interest, or necessity requires." As the Supreme Court said, this criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. "The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and where an equitable adjustment be-

tween States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities.”⁵

Some of the fundamental principles involved are well expressed in the old but notable case of *In Re Shelton St. Ry. Co.*, 69 Conn. 626, 38 Atl. 362 (1897), where the Court said:

We often speak of public necessity merely as a conducive move to legislative action, and so used it simply indicates that the legislature thought the action on the whole to be wise; but when the contemplated action depends for its validity upon a legislative finding of public necessity, the phrase has an important meaning, although necessarily a somewhat indeterminate one. Such legislative finding in many cases lies wholly in discretion. Public necessity, in this sense, is that urgent, immediate public need arising from existing conditions which, in the judgment of the legislature, justifies a disturbance of private rights that otherwise might be legally exempt from such interference. The term is, therefore, a relative one.

Any qualified person who desires to establish a radiobroadcast station is privileged under the law to apply for the facilities of an existing station, and the Commission must hear his application. The construction and operation of a broadcast station under a license from the Radio Commission does

⁵ *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Company*, 289 U. S. 266 (1933).

not create a property right which may be asserted against the regulatory power of the Commission. *White v. Federal Radio Commission*, 29 F. (2d) 113, 114 (1928), certificate dismissed, 282 U. S. 367 (1931); *General Electric Co. et al. v. Federal Radio Commission*, 31 F. (2d) 630, 633 (1929), certificate dismissed, 281 U. S. 464 (1930); *Great Lakes Broadcasting Co. v. Federal Radio Commission*, 37 F. (2d) 993, 995 (1930), certificate dismissed, 281 U. S. 706 (1930). A station owner's rights are subject to the paramount authority of Congress to exercise reasonable regulation of broadcasting. *City of New York v. Federal Radio Commission*, 36 F. (2d) 115, 116 (1929). The right of Congress to regulate broadcasting is not fettered by the necessity of maintaining existing arrangements. *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 282 (1933); *United States v. Gregg*, 5 F. Supp. 848, 857, 858 (1934).

It is clear from the statute and the authorities cited that Congress intended the allocation of radio facilities to be a living function of the Commission, continuously carried out in the general public interest.

On the other hand, the Commission must consider the equities of those who apply to furnish radiobroadcast service. Such consideration, to be fair to all, must be according to uniform rule, making allowance, as this Court has frequently said, for

reasonable exercise of discretion. (See, e. g., *Pulitzer Publishing Company v. Federal Communications Commission*, 94 F. (2d) 249 (1937)).

For many years the Commission and its predecessor (the Federal Radio Commission) have operated under procedural rules designed to afford fair hearings to all parties. Only two of these require discussion herein.

Rule 106.4 provides:

In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, excepting, however, applications filed after any such application has been designated for hearing.

This Court has long since said that controversies between applicants should not be decided "on the mere question of priority of application," but rather "on the basic standard which Congress has directed shall apply, namely, the public interest, convenience and necessity." (*Symons Broadcasting Company v. Federal Radio Commission*, 64 F. (2d) 381, 62 App. D. C. 46 (1933)).

Rule 106.4, besides being a rule of administrative convenience in hearing applications, was also designed in aid of the basic standard. Thus, priority

of application might have substantial reference to the basic standard if a succession of applications filed for the purpose of achieving delay could forestall the establishment of a station and thus deprive the public of service which should have become available promptly. At this point it should be noted that the Frontier application was filed and heard during a period when a presumptively valid order of the Commission existed denying the Heitmeyer application. Obviously, therefore, the Frontier application must be considered as having been prosecuted in complete good faith and not for purposes of delay.

The effect of Rule 106.4, then, is to join for simultaneous consideration, conflicting applications which have been filed within a reasonable time of one another. Applications filed after the time designated in the rule will not, therefore, work to deprive the public of radio facilities if any of the timely applicants are qualified to render the service needed.

The delinquent applicant, however, is not without redress. Rule 105.20 provides:

Any party may, at any time, more than 10 days prior to the date of any hearing, file with the Commission a petition to intervene. If the petition discloses a substantial interest in the subject matter of the hearing, the Commission may grant the same and permit the petitioner to be heard at such hearing.

So, if his application is filed before the hearing on the prior applications, he may petition to intervene and set up such matter as is pertinent to the issues in an effort to defeat the prior applicants. *He may not, however, prevent the Commission from entering an order in the proceedings*, but he may show such things as will cause the Commission to deny the pending applications and thus leave a free field for his own when it is heard. This frequently happens in practice.

At the outset of the discussion on the specific procedural steps taken in the instant case, we desire to point out that the facts differ from the *Pottsville* case, wherein the Commission had before it matured applications which might be considered on records which did not need enlargement; and from the *Colonial* case (now pending before this Court, Cause No. 7264),⁶ wherein the Commission acted upon a current applicant and found the applicant fully qualified to render a needed service.

Heitmeyer complains that when this Court reversed the Commission the latter should have proceeded forthwith to promulgate new findings on the record as already made. Heitmeyer challenges the power of the Commission to order a further hearing in consolidation with a hearing *de novo* on the Frontier Broadcasting Company application.

⁶ *Colonial Broadcasters, Inc., v. Federal Communications Commission.*

In plain language he desires to prevent the Commission from exercising its sound discretion, as required by the Act, in ordering a further hearing. The Commission recognized that under the circumstances Heitmeyer is entitled to his record as already made. Moreover, he may stand on the present record, but this does not prevent the Commission from considering that record in the light of present conditions. We will later discuss this aspect of the case.

The first action of the Commission in this proceeding took the form of a negative order—a denial. Heitmeyer received no rights, illusory or otherwise, from such an order. This Court reversed that order, and such reversal, as the Courts have repeatedly said, is to overthrow, set aside, make void, annul, repeal, or revoke the former order. *Loanes v. Gast*, 216 Mass. 197, 103 N. E. 473 (1913); *St. Louis v. Kellman*, 235 Mo. 687, 139 S. W. 443 (1911); *Cowdery and London v. San Francisco*, 139 Cal. 298, 73 Pac. 196 (1903). No final order exists, and the Commission has full power to proceed in accordance “with the law of the case” as settled by this Court’s opinion.

In remanding the case this Court said:

The decision, therefore, will be reversed and the case remanded to the Commission with instructions to proceed with the application in conformity with this opinion. This does not mean that it is directed to issue a

permit to the appellant. It is not the function of this court "to revise the action of the Commission from an administrative standpoint and to make an administrative judgment * * * the Commission in its further action is to respect and follow the * * * determination of the questions of law" by this court. *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 276, 278.

The hearing on this application was held on October 29, 1935 (2 F. C. C. 637, 639). Since that time conditions have changed, new engineering standards have been adopted, other stations have been licensed, new provisions have been added to the Act by Congress. Among the latter is the amendment to Section 307 (b) (49 Stat. 1475),⁷ which was approved and made effective on June 5, 1936, and which this Court commented on in its decision on the *Heitmeyer* case in the following language:

The discretion which the Commission is directed to exercise is not absolute. The purpose of the statute is to secure to the people of the several states and communities a fair, efficient, and equitable distribution of radio service. The Commission is directed by the statute to apply this standard in considering applications for licenses "when and insofar as there is demand for the same" [§ 307 (b)]; and, "if public convenience,

⁷ Public, No. 652, 74th Congress, approved June 5, 1936.

interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license * * *” [§ 307 (a)].

As will be observed, however, the present provisions of Section 307 (b) of the Act were not in existence when the record was made, and the provisions of that section form one of the issues on the further hearing.

Sections 309 (a) (48 Stat. 1085) and 319 (a) (48 Stat. 1089) direct the Commission to grant an application only if an examination thereof shows that the public interest, convenience, and necessity will be served thereby. The Commission was not able to make such a finding on the basis of a three-year-old record and in view of the changes in law and regulation intervening.

We must now look for a moment to the other applicant to establish a new station in Cheyenne; namely, Frontier Broadcasting Company. That application was filed on August 31, 1936. It was designated for hearing on November 17, 1936, and heard before an examiner on February 26, 1937.

Thus, many months before this Court handed down its decision in the *Heitmeyer* case, the Frontier application was ripe for Commission action. No action was taken, however, because of the pendency of the Heitmeyer appeal and to avoid conflict with any conceivable mandate in that case.

The mandate directed the Commission “to proceed with the application in conformity with this

opinion," and in no way prevented the Commission from holding the further hearing on Heitmeyer or considering Frontier. "The terms of the statute are broad enough to let in, at the direction of the Commission, parties who may make application in the interim between the first proceeding and the new proceeding." *Black River Valley Broadcasts v. Frank R. McNinch et al.* (decided November 21, 1938).

Here, then, were two applications, both of which had once been heard, and final disposition was not made of either. With regard to the original hearing on each, Rule 106.4 had applied and was enforced. But a new hearing was now ordered, and as to this hearing Rule 106.4 was also applied.

Heitmeyer, in effect, complains that Rule 106.4 should refer back to the original hearing, and thus Frontier should be excluded from consideration. But Section 4 (j) (48 Stat. 1068) of the Act specifically provides that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

The language quoted from Section 4 (j) is identical with that of Section 17 of the Interstate Commerce Act (49 U. S. C. A. § 17). This Court had occasion to construe the language in *U. S. ex rel. Delaware & Hudson R. Corp. v. Interstate Commerce Commission*, 51 F. (2d) 429, 430 (1931). In that case the relator sought writs of certiorari,

mandamus, or prohibition to prevent an alleged misjoinder of causes and parties. This Court pointed out that the procedure pursued before the Interstate Commerce Commission did not conform to the rules adopted by courts of law. "However, the Commission is an administrative body and its proceedings * * * are administrative and not judicial in character. The Commission, therefore, is not hampered in such proceedings by the hard and fast rules as to pleading and practice which prevail in courts of law."

We by no means concede that the Commission's procedure in this case does not conform to the practice of courts of law. The Commission's action was wholly consistent with such practice, as we will show. The *Delaware & Hudson* case is cited merely as illustrative of the discretion given the Commission by Congress in Section 4 (j) (48 Stat. 1068) of the Act.

The questions involved in *Illinois v. Central Railroad Co.*, 91 Fed. 955 (1899), were essentially concerned with the public interest and convenience, as they were determinative of the right of the railroad company to penetrate the waters of Lake Michigan to the point of navigability. The Circuit Court pointed out that the Supreme Court, through previous review, had disposed of all questions, save one of fact, and continued:

It is said by counsel that such inquiry should be limited to the date of the filing of

the information in this suit, to wit, March 1, 1883, and that we have no right to consider any changes in the situation occurring since that date, which may have enlarged the right. In this contention we cannot concur. The language of the mandate does not so speak. It is couched in the present tense, speaking to the date of the decree, and in our judgment rightly so speaking. Equity is not arbitrarily bound to decree rights as they existed at the date of bringing the suit. It considers the nature of the right, the situation of the parties at the date of the decree, and what is at that time equitable to be done. It recognizes changes in the situation of the parties and their rights since the filing of the bill. So that, in the case before us, if there have been changes in those things which should control our judgment which materially affect the situation, it is fitting that a court of equity should regard such changed conditions and conform its decree thereto.

The foregoing decision was appealed to the Supreme Court, and in approving the views of the Circuit Court, the former said:

The words of our mandate, "practical navigability, having reference to the manner in which commerce in vessels (on the lake) is conducted," admonished the Circuit Court that the question as to the extent to which the railroad company could rightfully continue to occupy the bed of the lake with

piers, docks, or wharves was not to be determined upon narrow, technical grounds, but upon grounds which, under all the circumstances, would be fair and reasonable as between the company and the public, having reference to the manner in which commerce was commonly or habitually conducted in vessels of various sizes.⁸

We have shown that since the entering of the Commission's 'original negative order conditions have changed. That in any event a further hearing was necessary on the Heitmeyer application. That the Frontier application was filed and heard during the period the Commission's order denying Heitmeyer still stood (and long before this Court's decision in the *Heitmeyer* case) but action was withheld on Frontier because of the pendency of the appeal. That manifestly the Frontier application was filed in good faith and not for delay. And that under these circumstances both applications were reset to be further heard in a consolidated proceeding. By hearing Frontier *de novo*, Heitmeyer is afforded opportunity to challenge the Frontier record in its entirety, as he did not participate in the original Frontier proceedings, but the same privilege was not accorded Frontier as to Heitmeyer because under the order the latter's existing record remains for consideration. We submit

⁸ *Illinois v. Illinois Central Railroad Company*, 184 U. S. 77, 95 (1902).

that under these circumstances the Commission's order entails no abuse of discretion.

In *Red River Broadcasting Co. v. Federal Communications Commission*, 98 F. (2d) 282 (1938), this Court construed several provisions of the Act in the light of one another to show the availability of administrative remedies. The same process may be employed usefully here.

We have already set forth Section 4 (j) (48 Stat. 1068), which empowers the Commission to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. Section 403 (48 Stat. 1094) provides that the Commission shall have full authority and power at any time to institute an inquiry on its own motion in any case or concerning any question which may arise under any of the provisions of the Act. Section 405 (48 Stat. 1095) authorizes rehearings, and pursuant to rehearing the Commission is authorized to consider all facts, "including those arising since the former hearings."

We submit that these statutory provisions afford ample power for the Commission to proceed as it did.

These proceedings, which have involved recourse to extraordinary legal remedies and to equity, when sifted down, show that the appellee has tried to prevent the Commission from holding a further hearing on his application and from considering his claims simultaneously with those of Frontier.

Upon consideration of the nature of the task assigned to the Commission, of the duties which the Commission must perform with regard to each application, of the necessity for intelligent determination of each application, and of the power of administrative bodies as shown in the foregoing discussion, we do not believe that this Court will tell the Commission that it cannot hold the further hearing or that it has abused its discretion under the circumstances in also considering the Frontier application.

D. CONCLUSION

For the foregoing reasons, it is respectfully submitted:

As the lower court lacked jurisdiction to entertain the appellee's Bill of Complaint, the decision of the lower court denying the motion of the Commission to dismiss the Bill should be reversed and the cause remanded with instructions to sustain the motion and dismiss the Bill.

The proceedings before the Commission have been in full conformity with the law and rules.

FEDERAL COMMUNICATIONS COMMISSION,

By WILLIAM J. DEMPSEY,

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Acting General Counsel.

WM. H. BAUER,

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Andrew G. Haley
Assistant Counsel.

*Ford v Natl Labor Relations Bd
Decided Jan - 3*

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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No. 7228—Special Calendar

Joseph W. Stewart

CLERK

**In the United States Court of Appeals
for the District of Columbia**

FRANK R. McNINCH, T. A. M. CRAVEN, GEORGE H. PAYNE,
ET AL., AS COMMISSIONERS OF THE FEDERAL COMMUNICA-
TIONS COMMISSION, APPELLANTS

v.

PAUL R. HEITMEYER

BRIEF OF PAUL R. HEITMEYER

CLARENCE C. DILL,
JAMES W. GUM,
Counsel.

on main question:

148 US 228 -

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OPENING STATEMENT

The Opinion of this Court, per Curiam, allowing the special appeal in Original No. 2932, McNinch et al v. Heitmeyer and setting it down for hearing with No. 7016, the Pottsville Broadcasting Company, appellant v. F. C. C.; Schuyskill Broadcasting Co., Intervenor, stated that these two cases "present together a procedural question of importance which should be settled." In accordance with this opinion we shall give special attention to the "procedural question" involved in the Heitmeyer case.

The procedural question involved here is what this quasi-judicial body, the Federal Communications Commission, must do after a Court has reversed its illegal order previously issued, on a record made at a hearing ordered and conducted by that body.

In this case the Commission simply cancelled its former findings and order and *without making any new findings* ordered a further hearing on the application of Paul Heitmeyer, the original appellant. This in effect was a failure to give any further consideration to the record which the Commission had previously closed and upon which closed record both the Commission and this Court had acted.

By such procedure, the Commission completely nullified everything Heitmeyer won by his appeal. He simply had the right to enter upon a new hearing without ever having had a legally correct decision on the record made at his prior hearing. In fact, it was even worse than this because the Commission consolidated this further hearing with two other applications, both of which had been filed while his appeal was pending in the Court of Appeals. They had never been parties to the proceedings in connection with his application. They were unknown to the record in this case.

The attempt to have a consolidated hearing with these two new applicants presents an entirely new legal question as to procedure for quasi-judicial bodies such as the Federal Communications Commission is. It has never been previously attempted under similar circumstances by any government commission.

It violates the legal right of Heitmeyer to have his case decided upon its own merits as it should have been decided, had the Commission made correct and complete findings. To attempt now to bring in two new parties who could not have been known to the Commission had its original decision been correct, is such a radical and unprecedented step that Heitmeyer desires the Courts to consider this proposed

procedure in all its implications and finally pass upon its legality.

STATEMENT OF PROCEDURAL QUESTIONS INVOLVED.

Stated in other language, the procedural questions involved are simply:

1. Whether or not under the opinion and direction which this Court made to the Commission after reversing the Commission's decision, the Federal Communications Commission is acting in accordance with this Court's opinion when it sets Heitmeyer's application for further hearing without making any new findings or conclusions upon which to base its order, and
2. Whether or not the Federal Communications Commission has the right under the law and this Court's decision and order, either with or without findings and conclusions, a consolidated hearing with two other applicants who were never parties to this case and who filed their applications long after the record in this case was closed and an appeal taken to this Court, thereby making Heitmeyer's record upon which the Commission was reversed, worthless and useless, since a new record must be made in the newly ordered consolidated hearing.

COMMISSION SHOULD BE REQUIRED TO MAKE FINDINGS.

In Sec. 402-e of the Act, the law says:

"* * * the Court shall hear and determine the appeal upon *the record before it* * * * the Court's judgment shall be *final*, * * *"

The United States Supreme Court said in *In Re Potts*, 166 U. S. 263:

“When the merits of a case have been once decided by this Court on appeal, the Circuit Court has no authority, without the express leave of this Court, to grant a new trial, a rehearing, or a review * * *”

That decision applies directly in this case. The Commission is bound, *not* to have “a rehearing or a review,” “without the express leave of this Court.” The Commission never asked this Court for leave to hold a further hearing. In fact, it has never given any grounds or reasons by findings of fact or otherwise for its order setting this case for further hearing.

Because of this failure of the Commission, the record contains no “decision” from which Heitmeyer could appeal under Sec. 402-a of the Act, limiting the right of appeal to “decisions” by the Commission. This order being illegal and not a “decision,” Heitmeyer could not appeal to this Court under the statute. His motion for a “Rule to Show Cause” preliminary to a Writ of Mandamus having been denied, and Stay of Mandate also denied by this Court, his remedy at law was exhausted. He had no alternative but to apply to a Court of Equity to relieve him from the dilemma of losing all rights established by the reversal of the Commission’s wrong decision, or defaulting at the further hearing set by the Commission.

This question of procedure may be stated in different language, as follows: Can this Commission set aside, nullify, and ignore the law of its creation and the opinion of this Court, through the vehicle of “further hearing” without making findings of fact and conclusions based upon those findings? Without *any* pretense or attempt to correct the illegal, arbi-

trary and capricious "decision" after the Court remanded the case to the Commission, it uses the vehicle of "further hearing" to circumvent completely the judgment and order of this Court. The effect of all this is to make the result of the original appeal a joke and a farce, without effect or force of any kind. We call attention again to the fact that the law specifically and clearly states in Sec. 402-e, that this "Court's judgment shall be *final*."

Final for what? A further hearing? The creation of a *new* record with *new* issues requiring a *new* decision? Surely the Commission must make a legally correct "decision" *once* on a case nearly *four years* old?

In the case of *Morgan v. United States*, the Supreme Court said:

"The requirements of *fairness* are *not* exhausted in the taking *or* consideration of evidence, *but* extend to the *concluding* parts of the procedure as well as to the beginning and intermediate steps." (Emphasis ours) 304 U. S. 1, 20.

That case was decided April 25, 1938. In accordance with the opinion of this Court, and in "fairness" to Heitmeyer, the Commission must render a legally correct decision before it can do anything else. That is what the law contemplated in Sections 303, 307 a, b, 309 a, 310 a. We know of no element of fair play which suggests that this Court's judgment should be completely ignored, set aside and circumvented through the vehicle of a "further hearing." We know of no principle of law which permits or tolerates such defiance.

Pursuant to Section 307-a of the Act "The Commission, if public convenience, interest, or necessity will be served

thereby, * * *, *shall grant* to *any* applicant therefor a station license * * *." If the Commission refuses to make necessary findings, either with *or* without a hearing and a record, on public interest, convenience and necessity, the Act itself is vitiated. Can this quasi-judicial agency defeat the very intent, purpose and spirit of the Act by refusing to make *some* findings on the question of public interest, convenience and necessity through the vehicle of "further hearing" without giving reasons? Regular administrated procedure contemplates a rehearing or a "further hearing" *only* after a *final* "decision." See Sec. 405 of the Act.

If the present record as now constituted in good faith at *great* expense is not sufficient or satisfactory, why does not the Commission enter a decision to that effect, clearly appealable under the law? It may grant or deny the application, but it must make a decision. Can the Commission avoid the entry of an appealable order by mere procedural maneuvers *without* giving some reason for their action? Can they circumvent, set aside, and negate a final judgment of an appellate tribunal by the mere maneuver of a "further hearing," requiring the formation of a *different* record with *new* parties and *new* issues at *great* expense without making some findings as a basis for their action? Can the Commission make a "racket" of one's cherished American right of having a hearing, by hearing his application to death before deciding the issues? Is that the purpose of the right of appeal? Can the Commission flaunt justice in this way? Does the fact that it is a *public* agency paid with *public* funds to perform a *public* duty give it a right to disregard the simplest principle of justice, and then defend that act by referring to the "*public* interest" clause of the statute? Not according to the law as stated in *Morgan v. United States*, cited in-fra.

Counsel for the Commission in their brief in support of the Motion to Dismiss in the Court below contend, p. 3, second paragraph, that this application was set for further hearing and consolidated with *new* issues and parties because the Commission was "unable to determine from the record before it that public interest, convenience, and necessity would be served by a grant of the application." There is no record of this finding. This applicant has never been notified of such finding. Such a finding is necessary, Sec. 307-a. Such a finding "must include the basic facts from which the ultimate facts, in the terms of the statutory criterion, are inferred by the Commission." *Tri-State Broadcasting Company v. F. C. C.*, decided March 16, 1938, and *Saginaw Broadcasting Company v. F. C. C.*, decided same day—See 96 F. (2d) 554, etc.

These *necessary findings* have never been published; are not even referred to in the Commission's brief filed herein; such findings have never *actually* been made. In fact, Heitmeyer filed a formal motion with the Commission April 6, 1938, denied April 20, 1938, asking for just such findings. Such findings would have completely removed the necessity for the present litigation, because Heitmeyer could have then appealed directly to this Court. See Sec. 402 of the Act.

COUNSEL'S STATEMENTS ARE NOT FINDINGS.

Although Counsel for the Commission recognize the necessity for these findings by the above statement, the Commission refused to make them in preference to procedural maneuvers in the form of a "further hearing." The procedure attempted to be followed by the Commission herein, if approved, would set up a loop hole through which it could

avoid final decisions and thereby deny an applicant due process of law.

There is one final question in connection with a complete answer to the main question involved. Can this Commission refuse to make an appealable decision in connection with a final judgment of this Court, simply because of changed conditions which have developed because of that body's prior arbitrary, capricious and erroneous "decisions" without giving some reasons therefor in the form of findings and without any attempt to correct prior mistakes? To permit the Commission to do this would defeat all benefits to be derived by reversing an erroneous decision of the Commission and make the right of appeal in effect only a right to secure a "further hearing" at great expense and after intolerable delay.

If it be said that so far as this question is concerned each case must be decided in accordance with the particular facts of that case, then we turn again to that part of the Commission's order which consolidates this "further hearing" with the two new parties, hitherto unknown to this record. That part of the order would compel Heitmeyer to prepare an entirely new record, because of the new issues necessarily created by the addition of these two new parties.

ATTEMPT TO CONSOLIDATE HEARINGS WITH TWO NEW PARTIES.

This brings us to discuss the second procedural question stated above, namely, the attempt of the Commission to hold a "consolidated" hearing of the Heitmeyer application and the two new applicants, Frontier Broadcasting Company and Cheyenne Radio Corporation. It must be remembered always

in considering this question, that Frontier Broadcasting Company filed its application August 28, 1936, 60 days after Heitmeyer filed his original appeal to this Court, and Cheyenne Radio Corporation filed its application, December 7, 1936, almost six months after Heitmeyer's appeal.

The Commission never made any findings nor gave any reason for introducing these two new parties into this record. Counsel for the Commission in their brief, attempt to justify the Commission's unprecedented action by quoting that part of the statute which requires the Commission to grant licenses to those who will best serve the public interest, convenience and necessity. They would interpret that provision of the statute so broadly as to justify another arbitrary action against the Heitmeyer application. That provision of the statute is broad and somewhat indefinite, but not that broad and indefinite. As the Supreme Court said of this provision in *F.R.C. v. Nelson Bros., et al*, 289 U. S. 266, that although the Commission is required to grant licenses, as public interest, convenience or necessity requires, "this criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power."

Heitmeyer is entitled to have his case decided without regard to new parties. The Commission can not use its own mistake in making a wrong decision as a means of avoiding the separate consideration of his case. His application stands alone. No new applicants since the time when the Commission decided his case have any rights as against him. Had the Commission correctly decided his case, there would have been no possibility of considering other applications at the time of considering his application. This Court should protect that right. To fail to do so will be in direct violation of the long

established rule and practice of all courts whereby the decision of an appellate court becomes a mandate to the court below. See *Gulf Refining Co v. United States*, 269 U. S. 125; *Metropolitan Water Co. v. Kaw Valley Drainage District*, 223 U. S. 519, 523.

It is impossible to cite any precedents against this proposed procedure, that are directly in point, because never before, so far as counsel are able to learn, did any governmental body, authorized to grant the use of government controlled privileges, attempt such procedure. The two other quasi-judicial commissions, namely, the Interstate Commerce Commission and the Federal Power Commission, which grant similar privileges to applicants for certificates to build railroads and hydro-electric power plants, have no record of such attempted procedure. If the Courts permit this Commission to embark upon such a method of procedure, it will open a veritable Pandora's box of difficulties in the future.

Let us consider for a moment what judicial approval of this procedure will mean. This consolidated hearing with two new parties may be followed by a new appeal. That appeal may result in a new reversal since the decision to be made will be on a new record covering new parties and new issues. This will then require "a further hearing" consolidated again with whatever new applicants who might have filed applications for a new radio station at Cheyenne during the pendency of the second appeal. Under such procedure those opposed to the establishment of any radio station at all at Cheyenne, such as newspapers and other vested interests affecting public interest, might postpone the actual operation of a station there indefinitely.

In that connection, we call attention to sub-section (b) of Section 307 of the Communications Act, which specifically commands the Commission "shall make such distribution of licenses * * * among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Surely the Commission can not be permitted to follow a procedure whereby opponents of "fair, efficient and equitable radio service" to the people of Cheyenne, Wyoming, the state capital without a radio station or even satisfactory secondary radio service, are indefinitely denied the radio facilities which Congress commanded the Commission to give to them.

PROPER PROCEDURE FOR THE COMMISSION.

Paul Heitmeyer, the appellant in the original case and the respondent herein, insists that the proper procedure in this case, following the Court's reversal, is as follows:

1. Cancellation of old order and findings;
2. Preparation of new findings in keeping with this Court's opinion, the notice of hearings, and the law applicable to the case;
3. Preparation of statement of ultimate facts to be inferred from above; and
4. Entrance of final decision or order by the application of the statutory criterion.

This procedure is in accordance with the opinion and judgment of this Court as stated in its opinions reversing the Commission on the original Heitmeyer appeal and in the case of *Saginaw Broadcasting Co., v. F. C. C. et al*, 96 Fed (2) 554, 559.

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This procedure is in accordance with the opinion and judgment of this Court as stated in its opinions reversing the Commission on the original Heitmeyer appeal and in the case of *Saginaw Broadcasting Co., v. F. C. C. et al*, 96 Fed (2) 554, 559.

By such procedure the Commission would make a decision on the application as required by the Communications Act and by this Court's opinion. If Heitmeyer were then aggrieved he could appeal to this Court. This procedure would bring a finality to the case instead of making possible more new records and repeated appeals.

THE TECHNICAL QUESTION FOR THIS COURT TO DECIDE.

At present this case is before the Court on Special appeal. Technically the question is whether or not the lower Court erred in denying appellant's motion to dismiss the Bill of Complaint. Appellant contended in its motion below, R. 28, among other things, that

- (1) the appellee had a full, complete and adequate remedy at law; and
- (2) the matter was *res adjudicata*.

The same contentions are made in its brief—p. 8 and 17. These two contentions are so hopelessly inconsistent that we are unable to state exactly what appellant's *actual* position is in the matter. The cases they have cited in their brief to support these contentions have been misused. On p. 13 they cite several cases to support their contention that appellee has a full, complete and adequate remedy at law.

The Black River case, decided Nov. 21, 1938, is not applicable, because the decision in that case had never been before this or any other appellate Court at the time the Commission set it for re-hearing. That case involved the regular administrative procedure set up by the law itself. This Court pointed to that on p. 5 of its opinion and cited *Southland*

Industries, Inc. v. F. C. C., 99 F. (2d) 117. In the instant case, however, the law does not provide for a method whereby the Federal Communications Commission may vitiate, nullify and set aside a judgment of this Court. Such procedure is not at all regular so far as counsel for appellee have been able to ascertain.

The Jenny Wren case, 78 F. (2d) 729, has no application. The facts of that case have no similarity to the facts of this case. The questions of law involved are not even the same or distantly related.

In the Monocacy case, 90 F. (2d) 421, the application had not even been heard.

The White case, 29 F. (2d) 113, involves the *old* Radio law and is not possibly applicable here. (See p. 4 this Court's opinion in Black River case).

Counsel for the Commission cite the United States v. American Bond and Mortgage Co., 31 F. (2d) 448. The facts of these two cases are not even remotely similar to the situation at bar. However, this Court quoted with approval from the decision in that case on p. 4 of its opinion in the Black River case, as follows:

"We are likewise satisfied that appellants are not in a position to attack an order of the Radio Commission, which was within its power to make, *without first exhausting the remedies given them by the Radio Act*, to-wit, by appealing to the Court of Appeals of the District of Columbia." (Emphasis ours).

Heitmeyer had exhausted his remedies at law before filing his Bill in Equity. He could not appeal to this Court because the order for "a further hearing" was not a decision. He

did file an application for a Show Cause Order preliminary to a Writ of Mandamus with this Court which was denied. There is no other remedy at law, so that he was compelled to go to a Court of Equity.

On page 18, appellant's brief cites several cases to show that the instant situation is *res adjudicata*.

Enforcement of a *final* judgment is never *res adjudicata* until that judgment is satisfied or set aside. The *final* judgment of this Court reversing and remanding this matter to the Commission has never been complied with. Neither has it been set aside, appealed from nor attacked in any way.

Furthermore, the present Bill of Complaint is not for retrial of the *same underlying* issues or questions. Its *sole* purpose is to enforce a *final* judgment of this case. For these reasons, a careful reading of the cases cited by appellant in this regard shows that they are not at all applicable or in point.

What counsel for appellant calls *res adjudicata* is in fact simply an exhaustion of remedies at law, which counsel for the Commission themselves assert is necessary before a Bill of Complaint can be considered by a Court of Equity.

In conclusion, we submit that Equity *always* has the power to right a wrong and to prevent a nullification of justice. Years and years ago Chief Justice Marshall said in the case of *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362, that

"The sound public policy referred to must, necessarily, be somewhat elastic in order to be adaptable to special circumstances which may often present new conditions."

. . . "In all situations the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. *Where a new condition exists, and legal remedies are inadequate, or none afforded at all*, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones for that purpose." (Emphasis ours).

IRREPARABLE INJURY

Heitmeyer was faced with irreparable injury. If he refused to appear and take part in the "further hearing" consolidated with the two new applicants, his application would be in default and could be dismissed with prejudice under the rules. An appeal from such an order would be useless.

If Heitmeyer appeared and participated in the hearing, he must necessarily make an entirely new record and have that record considered in comparison with the records which would be made by the two new applicants. This would entirely destroy any further consideration of the record upon which he had won a reversal by this Court at a great expense. Thus this "further hearing" would not only be in fact a hearing *de novo*, but would be a comparative hearing with those two new applicants.

Whichever horn of the dilemma he might choose would impale him and make him helpless ever to secure a correct decision on his own separate application and on a separate record such as he is entitled to have and would have had, if the Commission had not made an erroneous decision, as found by this Court. To destroy that right would be an irreparable injury. Only a Court of Equity was left and he therefore

filed his Bill of Complaint. The District Court recognized that fact and refused to dismiss the Bill. The action of that Court should be affirmed.

CLARENCE C. DILL,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

PETITION FOR MANDAMUS AND
PROHIBITION IN NO. 7016,
POTTSVILLE BROADCASTING
COMPANY

vs.

FEDERAL COMMUNICATIONS COM-
MISSION et al.,
Consolidated for Hearing With
Appeal in No. 7228.

BRIEF FILED PURSUANT TO SUGGESTION CONTAINED IN THE ORDER OF THE COURT DATED JULY 27, 1938.

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**BRIEF FILED PURSUANT TO SUGGESTION
CONTAINED IN THE ORDER OF THE
COURT DATED JULY 27, 1938.**

A. STATEMENT OF THE CASE.

By its order dated July 27, 1938, this Court set this case down for hearing on the petition of the Pottsville Broadcasting Company for writs of prohibition and mandamus and respondent's objections thereto for the reason that a "procedural question of importance" is presented "which should be settled." However, it is submitted that not only is a procedural question involved, but also the ultimate determination of a right, the existence of which has been recognized by this Court.

As stated in the "Petition to Separate Causes for Hearing," filed herein by the Federal Communications Commission, the questions raised by the Pottsville Broadcasting Company petition for the writs of mandamus and prohibition "are entirely dissimilar" from those raised by the special appeal in *McNinch et al. v. Heitmeyer*, Original No. 2932. It is there pointed out that not only does the *Heitmeyer* case come to this Court on special appeal from an order of the District Court, involving a challenge of the jurisdiction of that court on four separate grounds, but, also, that "the *Pottsville* case squarely raises a question on the merits, viz., as to whether or not the Commission has acted in accordance with, and pursuant to, the certified copy of opinion and judgment of this Court and within its powers and jurisdiction under the Communications Act of 1934, as amended." Accordingly, it was urged that the two cases be separately heard in order to avoid confusing the issues raised by each.

One of the grounds upon which the Commission challenged the jurisdiction of the District Court in the *Heitmeyer* case was that "the plaintiff has a plain, speedy and adequate remedy at law by writ of prohibition, writ of mandamus, or appeal to the United States Court of Appeals for the District of Columbia." Thus the Pottsville Broadcasting Company has pursued the very remedy which the Commission asserted should have been followed by Heitmeyer.

The brief filed by the Commission in the *Heitmeyer* case brings forward contentions following the lines suggested previously in its "Petition to Separate Causes for Hearing," and none of which have any

application to the *Pottsville* case. In fact, at page 25 of that brief, it is stated:

“At the outset of the discussion on the specific procedural steps taken in the instant case, we desire to point out that the facts differ from the *Pottsville* case, wherein the Commission had before it *matured applications which might be considered on records which did not need enlargement; * * **” (Emphasis supplied.)

This, we submit, concedes the point which we have heretofore urged, namely, that there is no necessity for additional findings of fact, or for any further hearing or argument, or new parties in this case, and that under the mandate of this Court none of these things was permissible or warranted. The record here concededly “did not need enlargement”; it was and is complete. The case was sent back to the Commission, “solely that it may reconsider it” on *one* point as to which there was no occasion for going outside the record, taking further testimony or bringing in other parties. The case was remanded “for reconsideration” in accordance with the views “expressed herein.” Nothing was said about hearing or considering other applications “on a comparative basis” or allowing other parties “full latitude.” The case was not sent back for further proceedings generally, but merely for reconsideration on one point.* Other applications, whether “matured” or otherwise, have no place in the record on which the court decided this case and the Commission cannot now bring them in.

*See “Reply to Respondent’s Opposition to Petition for Writs of Prohibition and Mandamus,” at p. 12.

B. THE ISSUES.

The Commission by indirection is seeking to defeat the jurisdiction of this Court and to determine the rights of this petitioner by considerations inadmissible under the terms of the Court's decision heretofore announced. If the Commission, in the face of the Court's decision, may assign the case for reargument along with two other applications on another record made by other parties, it would seem to follow logically that the Commission has power then to decide the case without regard to the restrictions imposed by the Court's decision, otherwise such reargument would be a futility, a waste of both time and money.

When the Commission denied petitioner's application in the first place there was before it for consideration every issue raised by the notice of hearing or by the parties themselves. Either directly or inferentially the Commission decided all issues in favor of the petitioner with the exception of two. Only one of these, namely, the question of financial responsibility, was contained in the notice of hearing (R. 19); the other, the question of whether persons in control of corporate applicants for local stations should be residents and personally familiar with the needs of the area to be served, was never raised by anyone, and the first time that it appeared was as a second reason for denying the application.

When the case was reviewed by this Court, only these two main questions were presented, because they alone were responsible for the denial of the application. As a matter of fact, it was the opinion of this

Court that the second reason "perhaps would not have influenced the Commission to the point of denying the license, except for what the Commission viewed as the lack of financial ability on the part of the applicant." After consideration of the entire record, this Court held that the Commission erred in finding that the petitioner was not financially qualified.

As to the secondary reason for the Commission's denial, this Court found that "on the question of the propriety of confining grants of a local nature to local people the Commission has not given any indication of the adoption of a fixed and definite policy." However, instead of holding, as it clearly was warranted in doing, that the Commission acted arbitrarily and capriciously when it singled out petitioner as the object of a special rule, this Court, with extraordinary deference, remanded the case for reconsideration on the sole question of policy as to whether "grants of local stations should be confined to local people," it being adjudged that it was the intention of the statute that the Commission should have the power to deny an application for a "local" station where the applicant was a nonresident, but only in pursuance of a definitely announced general policy to be applied with substantial uniformity.

Although the case was thus remanded for consideration restricted to the one question of policy, the Commission proceeded to order a reargument of the petitioner's application upon *all points* presented by the record, obviously thereby including even the question of financial responsibility which had been specifically found by this Court in favor of petitioner, and

to direct that the argument take place in conjunction with that upon two other applications for the same facilities, one of which had not even been filed at the time the petitioner received a favorable report from the examiner who heard its case.

Because of the fact that such a *de novo* consideration, with the injection of new parties, and, necessarily, new issues, was inadmissible under the order remanding the case and would render that order nugatory, petitioner sought a writ of prohibition to prevent such unauthorized procedure. And inasmuch as the Commission had failed to announce a policy as to nonresident control of "local" stations, and had refused to grant petitioner's application after the cause had been remanded, a writ of mandamus was also sought. It was shown that the Commission had announced no such policy, but had, on the contrary, continued to grant applications to nonresidents or to corporations controlled by nonresidents who were not found personally to be acquainted with the needs of the area to be served, even after the decision of this Court herein (Petition, Sec. III, p. 4, and Sec. VI, p. 6). There being no such policy, and there being every indication that there was not the slightest intention on the part of the Commission to announce any such policy, but, instead, to make effective in all other cases a contrary policy, the contingent obstacle which remained to the granting of the application was automatically removed. The granting of the application thereby became a ministerial duty and the proper object of a writ of mandamus (Petition, Sec. VII, p. 6; also brief in support thereof, Point 2, p. 6 et seq.).

C. ARGUMENT.

1. Commission has no jurisdiction to conduct a further hearing or to make new findings of fact.

The Commission has made no reply to the contentions presented by the petition and brief in support thereof except to state that it has a right to consider anew all phases of the case regardless of their prior determination either by the Commission or by this Court, and that in order to determine the question of public interest it must consider other applications which are now pending for the same facilities. This is certainly no answer. It merely is an assertion that the Commission intends to do as it pleases regardless of any decision of this Court. It is a pronouncement that the Commission is the supreme and ultimate arbiter of the public interest. It makes review by this Court a mockery. An appellant still finds himself at the mercy of the Commission regardless of a Court decision in his favor.

We have heretofore shown that under the mandate of this Court, and according to well-established precedents, the Commission now has no jurisdiction to make additional findings in this case. (See Reply to Respondent's Opposition, Point 2, p. 3 et seq.) It is bound by the findings on which it based its denial of the application. In reversing the Commission and remanding the case for reconsideration restricted to one question the Court did not open the door for what the Commission now asserts it intends to do, namely, to make new findings on what would be in effect a new record.

No question was raised as to the adequacy of the record presented to this Court and upon which its decision was based. The Commission had the opportunity then to designate the record and did so. It cannot now alter or enlarge that record, or "take judicial notice of the records in other proceedings before it between different parties." And this Court has also said that a Court of Appeals "can act only upon the facts appearing in the record before it." *White v. Central Dispensary and Emergency Hospital*, decided June 30, 1938.

There is, therefore, no justification for the argument made by opposing counsel that the Commission "retains full power to consider anew" the entire record in this case and in the case involving two other applications, and to make new findings of fact to support any order it may now choose to enter. The Commission has already exercised "the exclusive initial jurisdiction conferred upon it by Congress" and may not be permitted to oust the jurisdiction vested in this Court to keep it within the statute.

As the Commission's "Petition to Separate Causes for Hearing" concedes, "the Pottsville case raises a question on the merits." That question is whether or not the Commission at this stage of the proceeding has the right to assign this case for reargument along with two other applications on another record, made by other parties not before this Court, with a view to deciding such applications on a comparative basis without regard to the mandate of this Court restricting the Commission to a reconsideration of the one question left open in this case, involving the expediency or wisdom of adopting a uniform policy confining grants of a local nature to local people.

The Supreme Court has held that when the merits of a case have been once decided on appeal the inferior tribunal has no authority, without express leave of the Court having power of review, "to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer." The Commission is bound by the judgment as the law of the case, "and must carry it into execution, according to the mandate." The Commission "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded." *Re Potts*, 166 U. S. 263, quoting from *Re Sanford Fork & Tool Co.*, 160 U. S. 247.

2. If the public interest required reopening the case for the hearing of new parties or newly discovered evidence, it was the duty of the Commission to apply seasonably for leave of this Court for that purpose.

An application by the Commission for leave of this Court to conduct a further hearing or argument would have necessitated a seasonable showing as to the materiality of the newly discovered evidence, if any. We have found no case in which additional parties have been permitted to come in on a "matured" record.

As stated by the Supreme Court in *National Brake & Electric Co. v. Christensen*, 254 U. S. 430, "such applications are addressed to the sound discretion of the appellate tribunal, and should be decided upon

considerations addressed to the materiality of the new matter and diligence in its presentation.”

This Court decided the instant case upon the record before it, as required by Section 402 (e) of the Communications Act of 1934, which provides:

“At the earliest convenient time the Court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in the event the Court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the Court: * * * The Court’s judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari. * * *”

Obviously, there can be no finality to the judgment of this Court “upon the record before it” if that record may be changed at any time and in any way the Commission chooses without prior leave asked of or granted by the Court.

No application, “addressed to the sound discretion of the appellate tribunal,” has ever been filed, doubtless because the Commission recognizes its futility, since no “new matter” of “materiality” could be alleged to exist as affecting the one question sent back for reconsideration. In any event, the time has passed for any claim of “diligence in its presentation.” *National Brake & Electric Company v. Christensen, supra.*

In the case last cited the Supreme Court, referring to *Re Potts, supra*, stated:

“* * * it was held that the Circuit Court had no authority to grant or entertain a petition filed without leave of this court, for a rehearing for newly discovered evidence, and that mandamus was the proper remedy to set aside the order of the Circuit Court failing to execute the mandate of this Court.”

The court, in the *National Brake & Electric Co.* case, quoted with approval the expression in *Southard v. Russell*, 57 U. S. (16 How.) 547, as follows:

“Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits.”

In *Delaware, L. & W. R. Co. v. Rellstab*, 276 U. S. 1, the Supreme Court, again citing *Re Potts*, said:

“Like other appellate courts, the Circuit Court of Appeals has power to require its judgment to be enforced as against any obstruction that the lower court, exceeding its jurisdiction, may interpose. *McClellan v. Carland*, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501. The issue of a mandamus is closely enough connected with the appellate power.”

And again, in *Baltimore & O. R. Co. v. U. S.*, 279 U. S. 781, the Supreme Court said:

“* * * When a lower federal court refuses to give effect to, or misconstrues, our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus.”

In *Illinois ex rel. Hunt v. Illinois C. R. Co.*, 184 U. S. 77, the Supreme Court, citing numerous precedents and quoting from its prior decision in *Roberts v. Cooper*, 20 How. 467, 481, said:

“* * * To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members. * * *

“* * * Every matter embraced by the original decree of the circuit court, and not left open by the decree of this court, was conclusively determined, as between the parties by our former decree, and is not subject to re-examination on this appeal.”

Surely, if matters adjudicated by the court on a first appeal are not subject to re-examination on a second, such matters cannot be reopened by the Commission through the simple expedient of assigning the case for argument *de novo* and allowing “full latitude” to new parties as well as those properly in the case.

It cannot be assumed that the Commission was un-

aware of the law and the decisions requiring prior leave of this Court to reopen the case. Nor can it be assumed that had the Commission been in a position to show the necessity for a hearing *de novo* it would have failed to submit its application seasonably. It is fair to assume, therefore, that no new matter of a material sort was or is known to exist or would be pertinent on the one point as to which the case was remanded for reconsideration.

If the Commission shall be permitted to indulge in capricious and arbitrary administration of the Act, denying an application on any ground it chooses to assign, without regard to precedent, rules or regulations, and then to arrogate unto itself the right to reconsider the matter in defiance of the restrictions imposed by the Court having statutory power of review, the Act as an expression of legislative intent becomes a nullity and exists only as the plaything of the Commission's fancy. Soon no individual with funds to invest, but without contacts calculated to win the Commission's favor, would care to risk the time, labor and money necessarily involved in filing and supporting an application for a radio license.

We have not felt it necessary to dwell upon the fact that this application was for a "regional" station under Commission Rule 120, and, therefore, that any policy which may be announced respecting control of "local" stations would be inapplicable to this case. (See Petition, p. 2 et seq.; also supporting brief, p. 6.) The Commission does not deny the fact, which is undeniable, but asserts that it is too late now to bring forward the argument, since the error of the Commission in treating this as though it were an application for a "local" station was not pointed out at an earlier

stage of the proceedings. (See "Opposition" of Commission, p. 5.) However, in view of the long-continued practice of the Commission, as evidenced by many of its decisions, respecting "local" as well as "regional" stations, this applicant had no reason to suppose that the Commission would deny this application on the ground that a stockholder of the applicant corporation was a nonresident of the community to be served. In no other case involving a corporate applicant has a denial been based on that ground, and in many cases where applicants have been nonresident individuals and the proposed station "local," licenses have been granted without any showing that such individuals were familiar with the needs of the area to be served. No distinction in this regard having been drawn between "local" and "regional" stations, the necessity for making the point that this application was for a "regional" station did not arise until the Commission based its denial on the ground that "those who will control the policies of proposed new 'local' broadcast stations should show themselves to be acquainted with the needs of the area proposed to be served and to be prepared to meet that need."

It being obvious that no general policy could be adopted to restrict the grant of licenses for "regional" stations to people in one particular locality, and since the Commission, even as to "local" stations, has manifested a contrary policy in its decisions rendered both before and after the decision of the Court herein, no good reason exists why the Court should not require the Commission to grant this application forthwith.

CONCLUSION.

It having been shown (1) that the action of the Commission in assigning this case for reargument without restricting such argument to the one question left open by the judgment and mandate of this Court constitutes contumacious disregard of the jurisdiction of the Court; and (2) that the law, as interpreted by the Commission itself and crystallized in a long line of decisions over a considerable period, permits, and, by construction of the body charged with its administration, requires the issuance of a license for a radio station to a corporation, if otherwise qualified, even though one of its stockholders is not a resident and acquainted with the needs of the area proposed to be served, it follows that the duty of the Commission "is so plainly prescribed as to be free from doubt" and, therefore, it is to be "regarded as being so far ministerial that its performance may be compelled by mandamus." *U. S. ex rel. United States Borax Company v. Ickes*, decided by this Court May 27, 1938, Wash. Law Rep., Vol. LXVI, pp. 612, 618.

It was the intention of Congress to commit the administration of the Act to the Commission only in so far as such administration is in accordance with the spirit and intent of the law. This Court, explicitly vested with power to review, is just as much a part of the machinery relied upon by Congress to carry out the legislative intent as is the Commission. If the Commission be allowed such latitude as will result in capricious and arbitrary administration of the Act,

ultimately it will lead to complete demoralization so that political considerations more and more will control. And if political considerations shall control the granting of licenses, they will ultimately control the policies of the broadcasting stations set up under such licenses subject to periodical renewals. If that condition be permitted to come about it is not difficult to visualize the ultimate extinction of any vestige of independence in the individuals or corporations who operate broadcasting stations.

“Freedom of the press” has long been recognized not merely as a cherished tradition of the American people, but as being essential to the preservation of our liberties. No regulation or censorship of the press has ever been attempted, nor would it be tolerated by the people. Freedom of the radio from political interference or domination is at least equally important; and since this modern and most important method of communication and public discussion is necessarily subject to the regulation of the Federal government, it is vital that such regulation be honest and impartial, free from all political considerations, and, like Caesar’s wife, above suspicion. Once permit bureaucratic or political domination of radio broadcasting, with licenses granted and renewed at the pleasure of bureaucrats serving some man or faction greedy for political power, enslavement of the press would follow. The radio is too powerful an instrument for molding public opinion to allow its control to pass beyond judicial scrutiny, and Congress was alive to the necessity for judicial review of the Commission’s

orders when it explicitly vested in this Court the jurisdiction which we now respectfully invoke.

Respectfully submitted,

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